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# CALIFORNIA UNREPORTED CASES

BEING THOSE

DECISIONS DETERMINED IN THE SUPREME COURT AND THE DISTRICT COURTS OF APPEAL OF THE STATE OF CALIFORNIA

BUT NOT

OFFICIALLY REPORTED

WITH

## ANNOTATIONS

SHOWING THEIR PRESENT VALUE AS AUTHORITY

REPORTED AND EDITED BY

PETER V. ROSS

Of the San Francisco Bar

Author of "Inheritance Taxation," "Probate Law and Practice," etc.

**VOLUME 1**

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# PREFACE.

It is a matter of common knowledge that not all of the opinions rendered by the supreme court and the district courts of appeal of California have been officially reported. Indeed, large numbers of them have never been reported at all, or made readily accessible to the profession. The value of these unreported cases and the advisability of publishing them have for years been subjects of discussion, but no plan for their publication has been put into execution until the present.

In an age when law reports are multiplying with such rapidity as they now are, publishers may well hesitate to launch any new series; and there has been more than ordinary hesitancy in this case—a hesitancy which has been overcome only by the assurance of numerous members of the Bar that a compilation of unreported cases would be welcomed. With the propriety of the publication thus established, editorial work was begun; and as it has progressed, the extent to which the unreported decisions have been cited by courts and legal writers, and the intrinsic value revealed in the opinions themselves, have placed the question of their importance to the practitioner beyond all controversy.

The number of unreported cases has varied greatly at different periods, there being surprising numbers at some times and at others hardly any or none at all. Referring to the first years of the organization of the supreme court, Mr. Justice Nathaniel Bennett writes in the preface of Volume 1 of the California Reports:

"A statute of the state authorized the supreme court to appoint a reporter, and it appointed Edward Norton, Esq. He had, as early as May, 1851, advanced far in the preparation of a volume of reports, but his manuscript was destroyed in the fire of May 4, 1851. He then resigned his office, and the undersigned, by the advice of his associates on the bench, assumed the task of reporting the decisions. By another statute, the decisions of the court, in *all* cases, were required

to be given in writing, and, by another statute, *all* decisions were required to be reported. The following volume embraces *all* the decisions of the court, from its first organization in March, 1850, to the end of the June term, 1851, together with one case decided at the October term, 1851."

It thus appears that in the early days the practice of the supreme court was to have all cases officially reported; and such is its present practice. But in the intervening half century hundreds of unreported cases are to be found. These, arranged in their chronological order and annotated to show their value as authority, constitute the subject matter of this publication—"The California Unreported Cases."

The attempt is here made to compile all of the written opinions of the supreme court and the district courts of appeal that have not been officially reported, omitting only the mere memorandum cases. The selection of leading cases or the rejection of those that might seem of minor importance has not been indulged, but all decisions which research has disclosed have been published, with the exception of those where the opinions are nothing more than memoranda. Even those cases in which rehearings have been had are included, reference in such instances being made to the final decision in the case.

The unreported cases decided during the first thirty years of the existence of the supreme court have hitherto been inaccessible, for they were to be found only in the archives of the clerk of the supreme court at Sacramento. A thorough search of the records of the clerk's office has been made, with the result that large numbers of early decisions heretofore unknown to the present generation have been brought to light and for the first time made available to the profession. To these have been added the unreported cases decided during the last thirty years of the court's history, making a complete compilation of the California unreported cases from the earliest days down to the present time.

The value of the reports has been greatly enhanced by a system of annotation showing where and to what effect the unreported cases have been cited in subsequent decisions of the courts of California, and of other American courts, state and federal. And whenever an unreported case has been cited in the notes in the American State Reports, American

Annotated Cases, and Lawyers' Reports Annotated, the citation is given. Moreover, in those instances where a case has subsequently come before the supreme court, either on a second appeal or on rehearing, reference to such subsequent and final decision is made.

It is estimated that this series of reports will make seven volumes, of approximately nine hundred pages each. The last volume will contain a complete index or digest of all preceding ones; also a complete table of cases reported, as well as tables of statutes, code sections, and constitutional provisions cited throughout the series.

The search for unreported opinions in the office of the clerk of the supreme court at Sacramento has been conducted by Mr. Thomas B. Leeper, of the Sacramento Bar, and acknowledgment is due for his efficient services in this connection. Acknowledgment is also due William George, Esq., of the San Francisco Bar, for invaluable assistance rendered in preparing syllabi and annotations.

San Francisco, January, 1913.

P. V. ROSS.

# CASES DETERMINED

IN THE

# SUPREME COURT OF CALIFORNIA

BUT NOT

# OFFICIALLY REPORTED.

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JOHN A. BLOOD, Respondent, v. SEYMOUR PIXLEY and T. L. SMITH, Appellants.

No. 587; September 15, 1855.

**Judgment.—Where a Judge Fails to Find** his conclusions of law and fact, as required by statute, the judgment is void.

APPEAL from County Court, Yuba County.

T. B. Reardon for respondent; Findley & Foster for appellants.

MURRAY, C. J.—This case was improperly tried under the old act concerning appeals from justices' to county courts, after the present act had gone into effect, and the parties, if they felt themselves injured by the first decision of the county court, should have appealed to this court; it is, however, now too late to correct this informality. The second judgment of the county court, now appealed from, is void, under the former decisions of this court, as the judge who tried the case has failed to find his conclusions of law and fact, as required by the statute.

Judgment reversed, a new trial ordered, costs to abide the result.

We concur: Heydenfeldt, J.; Bryan, J.

WILLIAM S. BRYANT, Respondent, v. BENICIA FLOURING CO., Appellant.

No. 742; September 15, 1855.

**Evidence.—The Jury is the Best Judge of the Weight of evidence, and more capable of arriving at conclusions than the court where the controversy refers to matters of common transaction.**

APPEAL from Solano County.

John Curry for respondent; William S. Wells for appellant.

HEYDENFELDT, J.—The assignments of error rest upon the refusal of a nonsuit and a new trial upon the facts.

The evidence seems to have been fairly submitted to a jury, and they were the best judges of its weight, as it is their peculiar province.

Sometimes, as in this case, the evidence seems very scant and but slenderly makes out the facts necessary to a recovery. In such cases much has to depend upon inference, and where the controversy refers to matters of common transaction, the jury is more capable of arriving at conclusions than the court.

The nonsuit and new trial having been refused by the judge before whom the cause was tried, we are not warranted in disturbing the judgment.

Judgment affirmed.

We concur: Murray, C. J.; Bryan, J.

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ALEXANDER H. DOLLARHIDE, Appellant, v. ISAAC F. THORNE, Respondent.

No. 653; September 22, 1855.

**New Trial.—The Exercise of Discretion by the Trial Court in granting a new trial will not be too closely scrutinized, particularly when the granting has been conditional upon payment of costs by the party favored.**

APPEAL from Napa County.

Hastings & Curry for appellant; Brown, Pratt & Tracey for respondent.

HEYDENFELDT, J.—The peculiarity of the relief sought by the bill of complaint shows that the delay caused by opening the judgment and giving a new trial cannot operate to the injury of the plaintiff, if it is finally determined that he is entitled to the relief. Adding to this the consideration that the payment of the costs by the defendant is made the condition of setting aside the judgment, we are not, in such cases, disposed to scrutinize too closely the exercise of discretion by the district court.

Order affirmed.

I concur: Bryan, J.

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## HARRISON HAIGHT, Appellant, v. WILSON KARY, Respondent.

No. 539; September 22, 1855.

**Appeal—Mandate or Remittitur—Time to Issue.**—By a rule of the supreme court no mandate or remittitur is allowed to issue to the court below before the expiration of ten days from the date of judgment.

APPEAL from San Francisco County.

Daine & Bouldin for appellant; Sam Broker and Sanders, Jr., for respondent.

MURRAY, C. J.—The judgment of the court below was affirmed on the 6th of March for want of a statement. On the 28th of the same month an application was made for a rule upon the opposite party, to show cause why an authenticated statement should not be filed and the judgment of the court vacated.

The January term of this court adjourned on the 6th of March, so that the application was not made until twenty-two days after.

By rule of this court no mandate or remittitur is allowed to issue to the court below before the expiration of ten days from the date of the judgment.

After the expiration of that time, the court loses all control over the subject, particularly if the court has adjourned. From this it follows that the application was not made in time.

The judgment of the court below is therefore affirmed.

We concur: Bryan, J.; Heydenfeldt, J.

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SOULE & PAGE, Respondents, v. THE STEAMBOAT PIKE, Appellant.

No. 622; September 22, 1855.

**Agency—Ratification by Principal.—If Lumber is Accepted by a Carpenter** for, and put by him into, the construction of a boat, and the facts are at the time within the knowledge of the boat's owner, the latter, although he has given the carpenter no authority to buy for him, is to be regarded as having ratified the acts of the carpenter as those of his agent, and he is responsible for the price of the lumber.

APPEAL from Fourth Judicial District.

N. Holland for respondents; Martin for appellant.

MURRAY, C. J.—The appellant assigns as error that there is no proof of any privity of contract between the plaintiffs and defendant. The testimony of the witness does not show that he was authorized to purchase the lumber in question, and without some authority, the defendant would not be liable. But the witness testifies that the lumber was used in the construction of the boat by the order of the owner. Now, I am of opinion that if the lumber was received and used with the knowledge of the owner, he thereby ratified the act of the witness and made him his agent for the transaction, and is liable.

Judgment affirmed.

I concur: Bryan, J.

HEYDENFELDT, J., Dissenting.—I dissent, because there is no proof of privity of contract, no proof that the lumber was

bought on account of the boat, or by authority of the owner. And although it was used in the construction of the boat, there is nothing to show that the purchase was not made by the carpenter and on his own account. And there appears from his testimony, taken by deposition and without cross-examination, a studied attempt to avoid a full and explicit relation of the facts.

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NATIVE AMERICAN MINING CO., Respondent, v. JOHN LOCKWOOD, Appellant.

No. 637; September 22, 1855.

**Appeal.—A Verdict Found by a Jury on Conflicting Evidence** will not be disturbed on appeal.

**Appeal.—An Appeal from Instructions, Given or Refused,** not appearing to have been excepted to, will not be entertained.

**Appeal.—Assignments of Error not Apparent in the Record will not be considered.**

APPEAL from Tenth Judicial District, Nevada County.

Regan & Dunn for respondent; Anderson & Whiteside for appellant.

HEYDENFELDT, J.—The first five points would require this court to review the evidence (which is of conflicting character) and pass upon the correctness of the verdict, which we have always refused to do. Second, the sixth and seventh assignments relate to the instructions given and refused, to which the record fails to disclose that any exceptions were taken. Third, the eighth, tenth and eleventh do not appear upon the record.

It therefore results that there could be no error as to the ninth and twelfth assignments, and therefore there is no error in the record.

The judgment is affirmed.

I concur: Murray, C. J.

GEORGE A. WHITNEY and JOHN B. FENNE, Respondents, v. WILSON FLINT, Appellant.

No. 588; October 1, 1855.

**Trial—Special Verdict.—Where a Complaint Sets Up a Contract** whereby the plaintiff was to release a debt due from defendant and give him an acceptance for more money, in consideration for which defendant was to deliver certain merchandise to him, and alleges then that afterward the parties changed the contract to the extent that the payment of sixteen hundred dollars by defendant to plaintiff was substituted for the delivery of the merchandise, and the jury at the trial brought in a special verdict to the effect that the contract as set up in the complaint was the contract of the parties, the verdict is not bad as leaving questions of fact for the court to find.

**Appeal.—A Judgment will not be Reversed** as being against the weight of the evidence when there is sufficient in the record to justify it.

APPEAL from Twelfth Judicial District, San Francisco County.

Jesse McHenry for respondents; Crittenden & Hoge for appellant.

BRYAN, J.—The complaint in this cause sets up a contract between the parties by the terms of which the defendant was to deliver to plaintiff a lot of merchandise, in consideration of the release to him of a debt due from him to the plaintiff and an acceptance for a further amount of money.

The complaint also alleges that afterward, and before the delivery of the merchandise, another engagement was substituted for the above, by the terms of which defendant agreed to pay sixteen hundred dollars. A special verdict was rendered in the cause to the effect that the contracts set up in the complaint were the contracts of the parties. Counsel object that this is not such a verdict as the court could render its judgment upon, because the facts are not so presented as that nothing could remain to the court but to draw from them its conclusions of law. I cannot perceive that this objection

has any weight. The complaint sets up certain contracts between the parties by the terms of which the defendant was first to deliver property, and by the second to pay an agreed amount of money, the one substituted for the other. Upon a verdict that the contract sued upon was the contract of the party, the court could have no difficulty in entering its judgment.

Upon the second point made by appellants the aid of the statute of frauds is improperly invoked. If, in the first place, the property to be delivered was subject to the order of the plaintiff, the property was not removed by them, and the transaction, in any event, could be disregarded by making a subsequent agreement in regard to the payment of the debt.

The proof shows that there was merely a change of the mode of payment of an existing debt. The evidence as disclosed by the record is sufficient to justify the verdict, and this court will not reverse a judgment for the reason that the weight of evidence is opposed to the finding of a jury where there is sufficient in the record to justify their finding.

The judgment of the court below must be affirmed, with costs.

I concur: Murray, C. J.

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DOPMAN, Respondent, v. HOBERLIN, Appellant.

No. 736; October 2, 1855.

**Appeal.—The Admission of Inadmissible Testimony,** through misapprehension by the trial court of the bearing of a decision of the higher court, is error for which a judgment will be reversed.

APPEAL from Superior Court of San Francisco County.

Hiram C. Clark for appellant.

MURRAY, C. J.—This was a suit instituted in the court below to recover the value of the plaintiff's services as agent of the defendant in the management of an estate in California. On the trial of the cause the plaintiff introduced two wit-

nesses to prove the value of his services in going twice to Europe to negotiate the purchase of the estate, etc. It was not shown that the plaintiff had undertaken these voyages at the request of the defendant or in what capacity he went. The question was hypothetical and assumed a certain state of facts not in proof. As this was one of the principal items of the plaintiff's demand, it must result that the testimony induced part of the verdict rendered by the jury. The court below, in delivering its opinion upon the motion for a new trial, admits that the question thus asked is objectionable, both in form and substance, but seems to consider it admissible, by a misapprehension of the decision of this court in the case of Innes v. Steamer Senator, 1 Cal. 459, 54 Am. Dec. 305.

An examination of that case will show that there is no analogy between it and the one before us, and that the question asked of the witness was neither speculative or hypothetical. For these reasons the judgment is reversed and the cause remanded.

I concur: Bryan, J.

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## JAMES F. HIBBARD, Appellant, v. CHIPMAN, PERALTA & AUGENBAUGH, Respondents.

No. 849; December 15, 1855.

**Reformation of Instruments.—The Assignment of a Lease does not carry with it the lessee's right to have a court of equity reform the lease for cause shown.**

APPEAL from Fourth Judicial District, San Francisco County.

E. W. F. Sloan for appellant; C. H. S. Williams and W. W. Chipman for respondents.

HEYDENFELDT, J.—Whatever rights the original lessees may have had to come into a court of equity to have the lease reformed, certainly no such right passed to the plain-

tiff by their simple assignment of the lease to him. He took with his eyes open, and can have no claim except to the extent given by the plain import of the terms of the lease. This view renders it unnecessary to consider the merits of the bill.

Decree affirmed.

I concur: Murray, C. J.

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HUGH O'CONNOR, Respondent, v. JOHN HAMMOND, Appellant.

No. 779; January 7, 1856.

**Witnesses.—The Question of the Incompetency of a witness to testify because of interest must be raised at the trial.**

APPEAL from Superior Court.

W. H. Rhodes for respondent; E. L. B. Brooks for appellant.

TERRY, J.—This cause was tried below by a jury, and the evidence fully sustains the judgment and there is no error on the record.

The witness Barney, who testified on behalf of plaintiff, was incompetent, on account of interest, and would no doubt have been excluded if the objection had been taken on the trial. This was not done, and the point cannot be raised here for the first time.

The judgment is affirmed, with costs.

I concur: Heydenfeldt, J.

ALPHONSE DERMITT, Respondent, v. DELESSERT, CORDIER & CO., Appellant.

No. 864; January 22, 1856.

**Judgment.—After a New Trial, had Agreeably to Stipulation** between the parties, a judgment that the first judgment "shall stand," the court thus adopting the findings upon which that judgment was rendered, is good.

APPEAL from Fourth Judicial District, San Francisco County.

Saunders & Hepburn for respondent; Sydney V. Smith for appellant.

HEYDENFELDT, J.—When the judgment was first rendered the finding of facts and conclusions of law were abundantly sufficient to support the judgment. Upon the final decision it is only ordered that the first judgment "shall stand," thus adopting also the findings upon which it was rendered.

There is not only no error in this, but it is in strict accordance with the intention of the parties when they entered into the stipulation to set aside the first judgment and obtained the opinion of the court upon the defense.

Judgment affirmed, with ten per cent damages.

I concur: Terry, J.

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ISAAC GRAHAM, Appellant, v. DURELL S. GREGORY, Respondent.

No. 695; January 22, 1856.

**Bill of Exceptions.—Although All the Testimony Need not be Embodied** in the statement of the case or in a bill of exceptions, there should be enough of it there to disclose to the court the points in controversy.

APPEAL from Third Judicial District, Santa Cruz County.

Edward Stanley for appellant; D. S. Gregory in pro. per.

HEYDENFELDT, J.—None of the facts of this case appear upon the record, so it is impossible to determine whether the instructions refused were applicable to the case or what influence those which were given may have had upon the finding. It is never required that the whole of the testimony should be embodied in the statement of a case or in a bill of exceptions, but a short statement of the tendency of the proof which will disclose the particular point of controversy is always necessary, in order to elucidate the error complained of whenever such error is said to have intervened in the instructions of the court to the jury or in rulings upon the law of evidence.

Judgment affirmed.

I concur: Terry, J.

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THOMAS KENT, Appellant, v. P. L. SOLOMON, Respondent.

No. 963; January 22, 1856.

**Execution—Liability of Sheriff.—The Owner of Property in the hands of one restrained by injunction from delivering it to him, in anticipation of a judgment of forfeiture, has, after such judgment, no action against the sheriff for levying on the property while in such hands.**

APPEAL from Fifth Judicial District, Tuolumne County.

E. F. Hunter for appellant; H. P. Barber for respondent.

HEYDENFELDT, J.—Under the agreed statement of the case no injustice has been done the plaintiff. It was certainly premature on the part of the sheriff to seize and detain the property before execution. But of this the plaintiff has no right to complain. It was in the custody of Adams & Co., who were under injunction against delivering it to anyone,

especially to the plaintiff. They were liable for its safekeeping and delivery to satisfy the judgment of the court issuing the injunction, and they alone had cause of complaint and a right of action for its forcible abstraction. The plaintiff had no right of possession and consequently no right of action. Subsequently, and before the commencement of this suit, judgments of forfeiture as to this property were rendered against the plaintiff, and upon executions issued thereon it was properly levied on and became in the rightful possession of the defendant.

Judgment affirmed.

I concur: Terry, J.

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JAMES TRYON, Respondent, v. DECATUR STRATTON and L. B. VAIL, Appellants.

No. 924; January 22, 1856.

**Reference.—A Referee must, in His Report, state the facts found and the conclusions of law.**

APPEAL from Eleventh Judicial District, Yolo County.

Cross & Thompson for respondent; Reed & Aukeny for appellants.

TERRY. J.—The report of the referee in this case does not state the facts found by him. In the case of Lambert v. Smith & McGilrey, 3 Cal. 408, the court held "that" the report of a referee like the finding of a court should state the facts found and the conclusions of law. Without this the parties would be remediless and their rights concluded in many cases by the arbitrary decision of a referee.

The judgment of the court below is reversed and the cause remanded.

I concur: Heydenfeldt, J.

ALEXANDER BROWN, Respondent, v. LEONARDO VIDAL, Appellant.

(Recorded as NEWLAND v. KEAN.)

No. 897; January 28, 1856.

**Dismissal of Action—Presumption.—In the Absence of Any Showing** to the contrary, the reason had by the trial court for dismissing an action must be presumed good and legal.

APPEAL from Fourth Judicial District, San Francisco County.

H. S. Love for respondent; J. B. Hart for appellant.

HEYDENFELDT, J.—There is no statement or bill of exceptions. None of the papers which appear in the transcript have any such verity as can make them portions of the record. There is left only the declaration, the answer and the judgment of dismissal.

All intendments must be in favor of sustaining the action of the district court, and although no reason appears for the dismissal of the action, it must be presumed there was a good legal one, in the absence of anything to show the contrary.

Judgment affirmed.

I concur: Terry, J.

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GLIDDON & STRATTON, Respondents, v. M. KERRY, Appellant.

(Recorded as AARON DAVIS v. GLIDDON & STRATTON.)

No. 903; January 28, 1856.

**Venue.—An Appeal from a Refusal of a Change** of venue will not be considered, when the affidavits on which the application was based are not embraced in the statement or bill of exceptions.

APPEAL from Nevada County.

C. A. Tweed for respondents; Dunn & Hupp for appellant.

HEYDENFELDT, J.—The appeal is from the refusal of the court below to change the venue.

The affidavit upon which we suppose the application was based is not embraced in a statement or bill of exceptions. It is a mere loose naked paper, has no verity, and is therefore no part of the record. It is consequently shut out from any consideration here, and the order is affirmed.

I concur: Terry, J.

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JAMES F. HIBBARD, Respondent, v. WILLIAM W. CHIPMAN and A. G. AUGENBAUGH, Appellants.

No. 774; February 18, 1856.

**Venue—Change.—The Affidavits upon Which the Motion Below was made must, on appeal for alleged error of the trial court in refusing a change of venue, be embodied in the statement of the case or in a bill of exceptions.**

**Venue—Refusal to Change.—It is Proper for a Court, after an order refusing a change of venue, to proceed with the trial, notwithstanding notice of appeal from the order.**

**Landlord and Tenant.—A Tenant Who has Repudiated His Lease and set up title in himself cannot complain if he is made to pay damages as a trespasser.**

APPEAL from Third Judicial District, Alameda County.

Sloan for respondent; Latham & Baldwin for appellants.

HEYDENFELDT, J.—We have no means of determining whether or not the court below erred in refusing to change the venue. There are loose affidavits sent up with the transcripts, which may have been used for that object; but they are not embodied in the statement of the case or bill of exceptions, have no verity, and are no part of the record.

It was not error for the court to proceed with the trial after notice of an appeal from its decision refusing a change of venue. Such a course would be a most vicious practice. Every case in which one party sought delay would have to be

continued upon an application for change of venue, however frivolous or imperfect it may be presented.

The rule of damages as adopted by the court was correct. The defendants, after renouncing their tenancy, setting up title in themselves and refusing to pay rent under the lease, have no right to claim exemption from the measure of damages applied to all trespassers. They disclaimed the character of tenants, and therefore cannot now claim to hold under the lease.

The remaining points are frivolous and will not be further considered.

Judgment affirmed.

I concur: Murray, C. J.

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A. BERNARD, Appellant, v. O. RAGLAN, Respondent.

No. 964; February 18, 1856.

**Appeal.—The Finding of a Jury, Deciding on the Weight of the evidence, will not, on appeal, be reversed unless impeached for fraud, misconduct or other improper influence.**

APPEAL from Fifth Judicial District, Tuolumne County.

E. F. Hunter for appellant; Qunitz, Scott & Dorsey for respondent.

TERRY, J.—This case was tried below by a jury and verdict rendered for defendants. Plaintiffs move for a new trial, on the ground that the verdict was contrary to the evidence. From the order of the court overruling this motion an appeal is taken. There were a number of witnesses on the trial below, and their testimony is conflicting. The question upon which the case turned was as to whether the mining claims in controversy formed a part of Shaw's Flat, six witnesses testifying that it was within Shaw's Flat and three that it was not. To determine the weight of the evidence was peculiarly the province of the jury. This court has fre-

quently decided that the finding of a jury, or a court sitting as a jury, deciding upon the weight of evidence will not be reversed by this court, unless such finding be impeached for fraud, misconduct or other improper influences: See Payne v. Jacobs, 1 Cal. 39; Johnson v. Pendleton, 1 Cal. 132; Hoppe v. Robb, 1 Cal. 373.

Judgment affirmed, with costs.

I concur: Murray, C. J.

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JESUS FIERRO, Respondent, v. JAMES L. GRAVES, Appellant.

No. 956; February 18, 1856.

**Judgment—Report of Referee—Weight of Evidence.**—A judgment on a report of a referee made upon conflicting testimony will not be disturbed on the ground that it is against the weight of the evidence.

APPEAL from Twelfth Judicial District, San Francisco County.

Sanders & Hepburn for respondent; G. B. Tingley for appellant.

TERRY, J.—This cause was tried below by a referee, who reported a judgment in favor of plaintiff. The evidence is amply sufficient to sustain the report, and this court will not, in a case where there is conflicting evidence, disturb the finding of a referee on the ground that it is against the weight of evidence.

The referee who tried the cause, from observing the appearance of the witnesses and their manner while testifying, is more likely to form a just estimate of their intelligence and credibility than a court from simply reading his notes of their testimony. There is no pretense that the case was not fairly tried or that improper evidence was admitted.

The judgment is affirmed, with costs, and ten per cent damages for a frivolous appeal.

I concur: Murray, C. J.

ANDREW LAWSON, Respondent, v. JAMES McGEE, Appellant.

No. 1005; February 18, 1856.

**Appeal.—A Verdict Made upon Conflicting Testimony is not to be disturbed.**

**New Trial—Newly Discovered Evidence—Hearsay.—A new trial should not be awarded on the ground of newly discovered evidence which is only hearsay.**

APPEAL from Superior Court, San Francisco County.

Baldwin & Bowman for respondent; H. B. Jones for appellant.

HEYDENFELDT, J.—Where the evidence is conflicting or susceptible of two constructions, we have always refused to disturb the verdict or finding. The newly discovered evidence relied on for a new trial was only hearsay, and therefore properly disregarded.

Judgment affirmed.

I concur: Murray, C. J.

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PEOPLE, Respondent, v. TAYLOR & McLANE, Appellants.

No. 904; February 18, 1856.

**Indictment.—A Defendant Should Present His Objections to the indictment before he pleads to it.**

**Criminal Law — Technical Errors.—In a plain case of proven crime the appellate court is not disposed to reverse the judgment because of an instruction that is incorrect only from a technical standpoint.**

Sessions, Sacramento County.

The defendants were charged with grand larceny and the imputed theft was of four hundred and fifty ounces of gold-

dust. At the trial a witness, on being asked by the prosecution if he could point out the man whom he "saw have the dust," said that he "must give a qualified answer." The court instructed him to answer directly, adding that after so doing he might give any explanation of his answer that the facts warranted. The witness then said, "I cannot positively point out the man." The court then allowed the district attorney to put this question; "Upon your best knowledge and belief, based on what you saw of the person, can you point out the man whom you saw with the property charged as stolen?" The answer was, "Yes; from the best of my knowledge and belief the defendant McLane is the man I saw with the carpetbag." The admission of the question and answer over the defendant's objection was assigned as error. Another error assigned was the court's allowing the district attorney to indorse upon the indictment names of prosecution witnesses after the grand jury had presented the indictment and after the term, another its permitting these witnesses to testify at the trial. The jury was instructed that, since larceny is rarely done in an open manner, the usual course is to prove the charge by circumstantial evidence, wherefore the presumption of theft rests on a person who has stolen property and is not able to account for the honest possession of it; and the court then applied this theory to the facts in the case.

Attorney General for respondent; Robinson & Beatty for appellants.

MURRAY, C. J.—The assignments of error are not well made, and whatever objection the defendants had to the indictment, should have been taken before they plead to the same. The instruction of the court may not be technically correct, but it was nowhere shown by the defense that the gold-dust was taken by any claim of right, other than the higher right, which thieves often assert, but which has never within our knowledge been successfully maintained in any respectable court of justice. The case is a bold larceny, barren of any defense, except ingenious quibbles, and we regret that we are not permitted to treat it as an appeal for delay and impose damages.

Judgment affirmed.

I concur: Terry, J.

NATHAN ROGERS, Sr., Appellant, v. JAMES L. GRAVES, Respondent.

No. 1011; February 18, 1856.

**The Rule of in Pari Delicto is not to be Invoked in a Case** arising out of carelessness or indifference on the part of persons dealing with each other as it would be in a case arising out of their common fraud.

**Evidence.—The Books of Account of One Party** to an action are not evidence when the entries do not specifically connect the other party with the transactions they refer to.

APPEAL from the Superior Court, San Francisco County.

Rogers and others, doing business in San Francisco as "The Hide Company," sued for a balance of account, to wit, $983.62, for money advanced to the defendant from time to time at his special request between October 6, 1853, and March 20, 1855. The answer denied generally and also set up a counter-indebtedness, a balance of $603.50, for hides sold to the plaintiffs at times varying between October 6, 1853, and May 1, 1855. The evidence disclosed very loose ways of business indulged in by both parties in dealing with each other. The defendant had a slaughter-house and kept outside the door a box into which his butchers would throw the hides as they were removed from the animals they slaughtered, and the hides would be lifted from the box by the plaintiffs' teamster, on his daily rounds, and taken to the Hide Company's establishment, neither party counting them. The defendant kept account of such cattle as he slaughtered in this way, viz.: every day the number was given by the butchers to the collector, the collector made a memorandum accordingly and from this called them off to the defendant each night, if he happened to be at home, and the defendant then made appropriate entries in his book in his own hand. If it happened ever that hides were sold to persons other than the Hide Company credit was given for them to the Hide Company in this book. The plaintiff also had a book, one in which the teamster would jot down the number of hides daily as he brought them in, but he took hides from many

slaughter-pens besides that of the defendant. A jury was dispensed with at the trial and the defendant's book was admitted in evidence. In deciding the case the court took the view that, although there was no reason to impute fraud to either party, after a transaction carried on in such a slovenly way it was warranted in applying the rule of in pari delicto and leaving the parties as it found them.

Blanding, Calhoun & Wise for appellant; G. B. Tingley for respondent.

HEYDENFELDT, J.—The defendant's books were inadmissible as evidence, for two reasons: 1st. No account was kept in them of any dealings with the plaintiffs. 2d. If they established the fact of the number of cattle killed, it was admitted that the hides from those cattle were sold to others, as well as the plaintiffs, and therefore no certainty could be attained as to the quantity which the plaintiff received.

Judgment reversed and cause remanded.

I concur: Murray, C. J.

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## CALIFORNIA STEAM NAVIGATION COMPANY, Respondent, v. A. J. BROWN, Appellant.

No. 925; April 7, 1856.

**Injunction—Restraint of a Trespass.**—An injunction will not be granted to restrain a trespass except where the injury threatened would be irremediable.

APPEAL from Sixth Judicial District, Sacramento County.

Winans & Hyer for respondent; McKune, Robinson & Beatty for appellant.

HEYDENFELDT, J.—The general rule is, that an injunction will not be granted to restrain a trespass, except in cases

where the injury would be irremediable. There is nothing to take this case without the influence of that rule.

Ordered that the injunction be dissolved.

I concur: Terry, J.

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S. M. TIBBETTS, Appellant, v. CITY OF SAN FRANCISCO, Respondent.

No. 947; April 7, 1856.

**New Trial—Motion by Both Parties.**—The granting of a new trial on motion of both parties is not an abuse of discretion so as to justify reversal.

**Appeal—Points Outside of Record.**—Points not raised by the record or necessary to be considered in disposing of an appeal are to be disregarded.

APPEAL from Twelfth Judicial District, San Francisco County.

Bristol & Spencer for appellant; Balie Peyton for respondent.

TERRY, J.—This cause was tried below by a jury, who rendered a verdict for plaintiff. A motion for a new trial was made, both by plaintiff and defendant, and a new trial ordered by the court.

It cannot be contended that the order granting a new trial at the instance of both the parties litigant was such an abuse of discretion on the part of the court below as would justify a reversal of the order. An appeal was taken by the plaintiff apparently for the purpose of procuring an expression of opinion on the part of the judges of this court on various questions which were raised on the trial below.

To this end it is stipulated that a new trial was refused to the plaintiff and was granted to the defendant. These orders are assigned as error, and the court is requested to pass upon various points which are presented by the parties. As these points are not raised by the record or necessary to the decision of the question before us, we have declined to investigate them.

The judgment is affirmed.

I concur: Murray, C. J.

HARRY LOVE, Admr., Respondent, v. DAVID WATTS et al., Appellants.

No. 1038; May 12, 1856.

**Appeal—Evidence not in Record.—A Judgment by the Court** upon evidence submitted by the plaintiff in default of the defendant's appearance, such evidence not being made a part of the record, is conclusive on appeal.

**New Trial—Conflicting Evidence.—Affidavits of Counsel** filed with a motion for a new trial and the counter-affidavits filed by the opposing counsel may go to make up conflicting testimony within the rule against disturbing the trial court's order disposing of such a motion, when based upon conflicting testimony.

APPEAL from Superior Court, San Francisco County.

Howard & Perley for respondent; William White for appellants.

TERRY, J.—This cause was tried below by the court. The defendant failing to appear, the plaintiff proceeded to introduce evidence, upon which a judgment was rendered. There is no statement of the evidence in the record. The finding of the court is therefore conclusive as to the facts, and is amply sufficient to support the judgment. The only question is whether the refusal of the court to grant a new trial on affidavit of counsel for defendant was such an abuse of discretion as would warrant a reversal of the judgment. We think not. Every material averment in the affidavit was controverted by counter-affidavits. It was then a case of conflict of evidence, and as many of the facts stated on the one side and denied on the other were necessarily within the knowledge of the judge who tried the cause, he was more competent to decide correctly as to the issue raised than we, who are strangers to the proceedings.

The judgment is affirmed, with costs.

I concur: Murray, C. J.

ELISHA PALMER, Appellant, v. JAMES COOK, Respondent.

No. 1047; May 12, 1856.

**Ejectment—Nature of Action.**—In a suit of ejectment, denial of judgment to plaintiff on the ground of his not having the possession of the property shows the court to be unaware of the nature of the action.

APPEAL from Fifteenth Judicial District, Trinity County.

W. W. Upton for appellant; J. C. Burch for respondent.

MURRAY, C. J.—This was an action of ejectment or possessory action under the statute. On the trial of the cause the court below found that the plaintiff was not in possession of the premises sued for at the time of the commencement of his action, and therefore not entitled to recover. According to our recollection of the law, if he had been in possession, he would have had no right, and certainly no necessity, to bring suit.

Judgment reversed and new trial ordered.

I concur: Terry, J.

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SAMUEL B. MARTIN, Respondent, v. CALEB P. WRAY, Appellant.

No. 1095; May 19, 1856.

**Specific Performance—Nature of Remedy.**—The action to enforce specific performance of a contract is an equitable remedy.

**Pleading.—Misjoinder of Causes of Action in a Complaint** is a defect to be taken advantage of by demurrer only, and if not so taken advantage of is deemed to be waived.

APPEAL from Third Judicial District, Alameda County.

Chipman & Pease for respondent; J. B. Hunt for appellant.

MURRAY, C. J.—There appears to be but two assignments of error: 1. That the plaintiff had an adequate remedy at law, and therefore could not resort to equity for relief. In our opinion, this is peculiarly a chancery case, being a bill for specific performance of a contract relating to real estate and the insolvency of the defendants alleged. 2. The misjoinders of several distinct causes of action. This should have been taken advantage of by demurrer, and if not so taken is deemed waived.

Judgment affirmed.

I concur: Terry, J.

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## WELLS, FARGO & CO., Appellant, v. WILLIAM MEARS COLMAN & CO., Respondents.

No. 1121; May 19, 1856.

**Bills and Notes.—One Who Takes by Indorsement a Fraudulent Note, with knowledge of the fraud, cannot enforce it against the alleged maker.**

APPEAL from Twelfth Judicial District, San Francisco County.

Halleck Peachy Billings and A. M. Heslep for appellant; Haight & Gary for respondents.

TERRY, J.—This was an action on a promissory note purporting to have been drawn by defendants in favor of one Chrysler and by him indorsed to Wells, Fargo & Co.

The answer denies the execution of the note and states that it was executed by one Van Dusen, who conspired with Chrysler to defraud defendants, that it was without consideration, and also set up a release from Chrysler of all demands, which release bore date subsequent to the date of the note. The answer states that the plaintiff took the note with knowledge of the fraud.

Upon these issues the case was submitted to the jury, who found a verdict for defendants. The defendants' [plain-

tiffs'] motion for a new trial being overruled, an appeal was taken. On an examination of the record we are unable to discover any errors which occurred on the trial to the prejudice of plaintiff. The case appears to have been fairly submitted to the jury, and upon the testimony adduced it is difficult to conceive that a different verdict could have been rendered.

Judgment affirmed, with costs.

I concur: Murray, C. J.

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JOEL FLYNN, Respondent, v. JAMES R. TRAVERS, Appellant.

No. 1025; May 19, 1856.

**Appeal—Frivolous Appeal—Penalty.**—An appeal by a defendant from a money judgment, where the answer controverted no fact set up in the complaint, and no evidence of payment was offered at the trial, is a frivolous appeal, warranting affirmance of the judgment and the adding of twenty per cent damages.

APPEAL from Twelfth Judicial District, San Francisco County.

Baker & Weston for respondent; J. C. Stebbins for appellant.

TERRY, J.—The allegations of the complaint, which are none of them controverted by the answer, are abundantly sufficient to entitle plaintiff to recover. And as defendant offered no evidence in support of his plea of payment, judgment was properly entered against him.

Judgment affirmed, with costs, and twenty per cent damages for the frivolous appeal.

I concur: Murray, C. J.

THOMPSON & BOOTH, Appellants, v. DANFORTH et al., Respondents.

No. 1037; May 19, 1856.

**Judge—Attorney Acting as, by Consent of Parties.**—A trial before an attorney, acting as judge under no authority other than the consent of the parties, is a nullity.

APPEAL from Fourteenth Judicial District, Nevada County.

McConnell & Stewart for appellants; Dunn & Hupp for respondents.

MURRAY, C. J.—This cause was tried in the court below, by consent of parties, by an attorney and not by the judge. The defendants moved for a new trial, upon a statement signed by the person who tried the cause, which order was granted by the judge of the court. It is now insisted that the statement was inadmissible for the purposes of the motion on this appeal. The whole proceeding was a nullity. But even if it was not, we would not allow a party to avoid the consequences of his agreement by availing himself of the fruits of a judgment and denying the legitimate consequences of it at the same time.

Judgment affirmed.

I concur: Terry, J.

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Matter of the Estate of RUDOLPHUS KENT, Deceased.

No. 1111; August 25, 1856.

**Administrators—Reducing Charges of, by Court.**—The court below is to be sustained in reducing, to figures deemed by it reasonable, the charges of an administrator and his attorney in the settlement of an estate.

APPEAL from Probate Court, Butte County.

W. L. Sexton and Stephen J. Field for Petitioner.

MURRAY, C. J.—The charges of the administrator against the estate do not appear to have been proved by competent evidence, and therefore were properly rejected. As to the charge for legal services in defeating the claim of the heir to the fund in the hands of the administrator, the court finds "that no such services were in fact ever rendered, and if rendered, the charge is exorbitant and unjust." There is no evidence of the fact in the record other than the receipt of the attorney for so much money and the affidavit of the administrator. It does not appear that these charges were reasonable, and in the absence of testimony upon this fact, we do not feel disposed to disturb the allowance of two hundred and fifty dollars made by the court. It may be admitted that an administrator is the trustee for the heirs and creditors of an estate, and as such it is his duty to protect the funds in his hands against simulated claims. And while he would be entitled in a proper case to his disbursements and expenses in this behalf, still it would be necessary, I apprehend, on his final settlement, to show that they were not only necessary, but reasonable; otherwise an entire estate might be consumed by enormous fees of courts and lawyers in fruitless litigation. Whatever may be the strict legal effect of the stipulation "not to contest the claim of the heir," it is beyond all doubt that for the purposes of this appeal the appellant cannot object to the character of the evidence, having stood by in the court below and permitted it to be introduced without exception on his part.

Judgment affirmed.

I concur: Terry, J.

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NICHOLAS LUNING, Respondent, v. BENJAMIN S. BROOKS, Appellant.

No. 1117; August 25, 1856.

**Reformation of Instruments—Jurisdiction of Equity.**—To reform or alter the terms of a written contract for mistake, etc., is within the jurisdiction of courts of equity.

**Reformation of Instruments.—The Mistake as to Which the Terms** of a written contract may be reformed on application to a court of equity must be proved to such court by competent evidence.

APPEAL from Superior Court, San Francisco County.

Williams, Shafter & Park for respondent; Benjamin S. Brooks in pro. per.

MURRAY, C. J.—The plaintiff filed his bill in equity in the court below to reform a written contract, alleging mistake, etc.

The jurisdiction of courts of chancery in such cases is well established, and relief always granted where the mistake is established by clear and positive testimony. In cases of doubt, however, it is denied on the well-known policy of the law that parol evidence ought not to be admitted to alter or vary the terms of a written instrument, and that parties having reduced their contract to writing are supposed to have embraced their full intentions therein.

We have examined the testimony in this case, and are of opinion that it was not of that character to warrant a court of equity (in accordance with the rules governing such cases) to reform or alter the terms of a contract solemnly entered into in writing.

Judgment reversed.

I concur: Terry, J.

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## RAMON LAFONTON, Respondent, v. GEROMINO GAUCHERON, Appellant.

No. 1036; August 25, 1856.

**Trial—Erroneous Special Verdict.—A Judgment Correct in Substance** will not be reversed because of an erroneous special verdict.

**Contract—Lack of Signatures.—It is Possible for Parties to a** contract in writing to be bound by the instrument, although they have not signed it.

APPEAL from Second Judicial District, Santa Barbara County.

Munia Hubert for respondent; Sanders & Hepburn for appellant.

MURRAY, C. J.—The special verdict of the jury that "the contract between the parties was void and not binding on the plaintiff, because not signed by him," was erroneous. Parties may reduce their contracts to writing, and if afterward it is agreed that such writing contains their true intention and they proceed according to such memorandum, it will be as binding as if signed by them respectively. The error of the verdict is not fatal in this case, as it is shown by the testimony that the written contract was not conformed to by the defendants, and that the plan of the building was altered three times before its completion. Under these circumstances, the plaintiff was right in abandoning the contract and bringing his action upon a quantum meruit. There is an error in the amount of the judgment. The plaintiff is required to remit the sum of forty dollars in the court below.

Judgment affirmed.

I concur: Terry, J.

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THOMAS S. BRIGHAM, Appellant, v. GRANVILLE P. SWIFT, Respondent.

No. 1074; September 22, 1856.

**Appeal—Denial of Motion—Matter Beyond Jurisdiction.**—An order denying a motion, made too late for the court to have jurisdiction of it, cannot be inquired into upon appeal from an order involving the same subject matter.

APPEAL from Sixth Judicial District, Sacramento County.

Long, Judah & Dunlap for Appellant; Harmon, Sunderland & Stanley for respondent.

MURRAY, C. J.—This is an appeal from an order refusing a motion to retax costs. The cost bill was filed on the 10th of February, 1855, and the motion to retax was made on the 22d of February, 1856. By a rule of the court below the party is allowed ten days from the filing of the bill in which to move to retax. The motion in this case was neither made

in ten days, nor a year and ten days, and when made the court had lost all jurisdiction over the subject. The error, if any, should have been corrected by appeal before the expiration of the time allowed by law for bringing cases before us. This cannot now be done by an appeal from an order of the court below involving the same subject matter.

Judgment affirmed.

I concur: Terry, J.

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PEOPLE, Respondent, v. RAMON BUELNA, Appellant.

No. 1151; September 22, 1856.

**Larceny—Assessment of Punishment.—A Jury has No Power,** upon convicting a person for grand larceny, to assess the punishment, except where in their discretion death is deemed to be the only adequate one.

APPEAL from Santa Cruz County.

Attorney General for respondent; John H. Watson for appellant.

MURRAY, C. J.—The appellant assigns three grounds of error on which he relies to reverse the judgment of the court below: 1. A refusal to change the venue; 2. That the court instructed the jury orally; and 3. That the jury should have assessed the punishment, and not the court. These objections are all frivolous. 1. There was no sufficient showing made for a change of venue; 2. What is complained of as an instruction is a simple direction as to the form of the verdict; 3. As before decided by us, the jury have no power to assess the punishment in case of grand larceny, except when in the exercise of their discretion they see proper to inflict the punishment of death.

Judgment affirmed.

I concur: Terry, J.

## PEOPLE, Respondent, v. JOHN WISE, Appellant.

No. 1179; September 22, 1856.

**Jury—Fresh Panel—Presumption in Favor of Action of Court.** In the absence of direct proof to the contrary, the trial court is supposed to have acted properly in ordering the sheriff to summon a new panel.

**Homicide.—An Incorrect Definition of Manslaughter Given by a Court** in charging a jury is not such an error as will avail a defendant against whom the jury subsequently in the case brought in a verdict of murder.

APPEAL from Fifteenth Judicial District, Trinity County.

W. T. Wallace for respondent; W. W. Upton for appellant.

MURRAY, C. J.—The first error assigned, to wit, the refusal of the court to sustain the prisoner's exception to the panel of trial jurors, is not well taken. The sixteenth section of the act, concerning jurors, provides that, when from any cause it shall become necessary, the court may order the sheriff to summon a jury, etc. In the absence of direct proof to the contrary, it must be supposed that the judge acted properly in directing a new panel to be summoned. The objection to the judge's charge defining the law of manslaughter cannot avail the prisoner, although erroneous. The case put in the charge would have been justifiable homicide and not manslaughter. But this is immaterial, as the jury have found the prisoner guilty of murder.

Judgment affirmed, and the court below directed to fix a day for carrying the sentence into execution.

I concur: Terry, J.

JOHN KEYS, Appellant, v. ISRAEL BROCKMAN, Respondent.

No. 1106; September 22, 1856.

**Execution—Liability of Sheriff.—In an Action to Recover Damages** from a sheriff for levying upon the plaintiff's alleged property in execution of a judgment against a third person, the jury may find upon the validity of a sale of the property to the plaintiff by the judgment debtor on the day of the levy.

APPEAL from Seventh Judicial District, Sonoma County.

W. Skidmore for appellant; Cook & Maupin and L. Sanders, Jr., for respondent.

TERRY, J.—The defendant, who was sheriff of the county, having in his hands an attachment against the property of one Davis, levied on certain property which is claimed by plaintiff, who seeks in this action to obtain damages for the alleged illegal seizure of the same.

The issue which was submitted to the jury was as to the validity of a sale of the property made by Davis to plaintiff on the day of the levy. Upon this point the jury found for the defendant, and the evidence fully justifies the finding.

The record discloses no error of law which would warrant us in reversing the judgment. It is therefore affirmed with costs.

I concur: Murray, C. J.

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PEOPLE, Respondent, v. MARVIN SELLERS, Appellant.

No. 1153; September 22, 1856.

**Indictment—Motion to Quash.—After Pleading to an Indictment** it is too late to move to quash it.

**Verdict—Impeachment—Age of Juror.—An Affidavit** by a juror that he is over sixty years of age is inadmissible to impeach his verdict.

APPEAL from Santa Cruz County.

Attorney General for respondent; John H. Watson for appellant.

MURRAY, C. J.—This appeal is frivolous. The motion to quash should have been made before the accused plead to the indictment. The affidavit of the juror that he was over sixty years of age was inadmissible to impeach or destroy his own verdict.

Judgment affirmed.

I concur: Terry, J.

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D. H. WHIPLEY, Appellant, v. SAMUEL FLOWER, Administrator of the Estate of I. BECKER, Deceased, Respondent.

No. 987; September 22, 1856.

**A Judgment by Default will not be Opened When It Appears to have come about through the defendant's gross neglect only.**

APPEAL from Sixth Judicial District, Sacramento County.

Long & Dunlap for appellant; Weller, Johnson & Morrison for respondent.

MURRAY, C. J.—Service was had upon the defendant in San Francisco more than forty days before default and judgment in this case. There was daily communication between the two places, so that the defendant had ample time to prepare for his defense. The affidavit, on which the motion to set aside the judgment was based, so far from showing surprise or excusable neglect, shows a gross neglect on the part of the defendant. He should have apprised his attorney of the time in which the answer should be filed, or the attorney ought to have obtained the information from the clerk's office and not have waited until judgment was taken against him.

With the merits of the case we have nothing to do.

Order reversed.

I concur: Terry, J.

PEOPLE, Respondent, v. WILLIAM H. TALMAGE (JESSE CAROTHERS, Intervener), Appellants.

No. 1078; September 22, 1856.

**Judgment—Power of Court to Set Aside.**—A party aggrieved by a judgment obtained by fraud may seek relief by appeal or by bill in equity, but the trial judge is without jurisdiction to set the judgment aside.

APPEAL from Superior Court, San Francisco County.

W. T. Wallace for respondent; Thomas & Heamstead and George C. Bates for appellants.

See People v. Talmage, 6 Cal. 256.

MURRAY, C. J.—The court below erred in setting aside the judgment rendered May 31, 1855. The term had gone by. Some eight or nine months had elapsed and the case had been appealed to this court, so that the superior court had lost jurisdiction over the matter.

We are of opinion that the court had the most undoubted right to explain the circumstances by which the judgment was obtained and to exonerate itself from any seeming participation in what it conceived to be a fraud; but in so doing the court had no power at the late day when the matter was called to its attention to disturb the judgment, and that the only remedy the aggrieved party possessed was by appeal or bill in equity to set aside the judgment upon the ground of fraud.

The order vacating the judgment is set aside.

I concur: Terry, J.

MARTIN DONLAN, Appellant, v. JOHN PARROTT and HENRY M. NAGLEE, Respondents.

No. 1137; September 29, 1856.

**Suretyship—Release by Extension.**—A surety is released if, without notice to him, the creditor gives the principal debtor an extension.

APPEAL from Fourth Judicial District, San Francisco County.

Julius K. Rose for appellant; Williams, Shafter & Park for respondents.

TERRY, J.—The plaintiff having granted to the principal debtor an extension of the time of payment, without the knowledge or consent of the surety, the liability of the surety is discharged.

Judgment affirmed.

I concur: Murray, C. J.

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SAMUEL J. DE WOLF, Respondent, v. ORRIN BAILEY, and ANNIE F. BAILEY (Wife), Appellants.

No. 1148; September 29, 1856.

**Mortgage—Redemption.**—**The Omission in a Decree of Foreclosure** to provide for a redemption of the property does not of itself prevent a redemption being made.

**Mortgage—Failure of Wife to Join.**—**In the Case of a Purchase Money** mortgage the interest of the wife in the premises is bound, although she does not join the husband in the execution.

**Appeal—Damages Because Frivolous.**—An appeal on errors assigned, in no manner supported by the record, subjects the appellant to damages along with affirmation of the judgment.

APPEAL from Fourth Judicial District, San Francisco County.

The suit was to foreclose a mortgage made by Orrin F. Bailey and Annie F. Bailey, his wife. The note and mort-

gage were for the purchase money of the premises and the latter were common property of the husband and wife. Against the latter there was no deficiency judgment asked or recovered. The defendants did not set up a homestead claim by their answer or attempt to prove any at the trial, and no objection was taken at the trial to the form of the wife's acknowledgment. The decree did not provide in express terms for a redemption.

F. C. Hambley for respondent; G. P. Forbes for appellant.

MURRAY, C. J.—The errors assigned by the appellant are not supported by the record. The question of homestead was never raised in the court below. The court properly admitted the note and mortgage in evidence. The mortgage would have been equally valid if it had not been signed by the wife, and the note was admissible as evidence of the debt of the husband. The decree does not cut off the right of redemption from the purchaser, under the provisions of the statute.

Judgment affirmed with costs and ten per cent damages.

I concur: Terry, J.

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PEOPLE, Respondent, v. JOHN FEHELY, Appellant.

No. 1180; November 18, 1856.

**Trial—Refusal of Particular Instruction.**—Judgment will not be reversed for error in refusing a particular instruction, when the charge given embraced such instruction in substance.

APPEAL from Fifteenth Judicial District, Trinity County.

W. F. Wallace for respondent; J. C. Zabinkie for appellant.

HEYDENFELDT, J.—There is nothing in the exceptions taken by the appellant which warrants the reversal of the judgment. The second instruction asked for by the defendant might have been given as asked, but the very same in-

struction was given by the court in its subsequent charge to the jury, and almost in the words asked. In such cases we have always refused to reverse upon that ground. The charge of the court is full and explicit as to every point which arose in the case, and is without legal objection.

Judgment affirmed.

We concur: Murray, C. J.; Terry, J.

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## JOHN FAIRBANKS, Appellant, v. WILLIAM BEAR and H. S. WOODHOUSE, Respondents.

No. 1213; November 18, 1856.

**Mines and Minerals.—Mining Laws Introduced in Evidence are to be construed by the court, and the question whether by virtue of them a forfeiture has accrued is a question of law.**

**Pleading.—After a Finding Against the Plaintiff for lack of jurisdiction of the court, the right remains in him to proceed in a court that has jurisdiction, and pleadings framed so as to prejudice this right are bad.**

APPEAL from Mariposa County.

B. B. Harris and Wade & Flower for appellant; Alfred F. Washburne for respondents.

HEYDENFELDT, J.—The first charge to the jury given by the court was clearly erroneous. Mining laws, when introduced in evidence, are to be construed by court, and the question whether by virtue of such laws a forfeiture had accrued is a question of law. It was therefore improper to submit it to the determination of the jury. The third instruction asked by the defendants was also improperly allowed. There was no issue under the pleadings which involved the question of the jurisdiction of the court, and that question ought, therefore, not to have been left to the jury. As the pleadings stand, the verdict would operate as a complete bar to any subsequent action by the plaintiff, whereas if, upon proper pleadings, the finding against him was the

result of want of jurisdiction in the justice of the peace, he would still have his right of action in the district court.

For these reasons, the judgment is reversed and the cause remanded.

We concur: Murray, C. J.; Terry, J.

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CHRISTINA SCHWARTZ, Respondent, v. ANDREW DE WIT and H. SOPHIA DE WIT (Wife), Appellants.

No. 1192; November 18, 1856.

**Nonsuit—Failure of Defendant to Answer.**—A nonsuit in a cause in which the defendant had filed no answer may properly be set aside, and there should be a new trial awarded the plaintiff.

APPEAL from Twelfth Judicial District, San Francisco County.

Baker, Dawes & Westar for respondent; J. C. Albertson and James McCabe for appellants.

HEYDENFELDT, J.—The plaintiff was entitled to judgment against the defendant, who failed to answer, and this makes the nonsuit erroneous. The court below was certainly right in correcting this error by setting aside the nonsuit and ordering a new trial. In another trial the plaintiff may obtain in the district court that which he seeks, and therefore this appeal is not properly taken.

Order affirmed.

We concur: Murray, C. J.; Terry, J.

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LORENZO E. WHITE, Appellant, v. S. B. HARRIS and JAMES T. STOCKTON, Respondents.

No. 1277; November 18, 1856.

**Equity—Legal Remedy.**—A Court of Equity is not Open to a party who has a remedy at law.

APPEAL from Seventh Judicial District, Marin County.

The plaintiff applied for an injunction to restrain the defendants from proceeding upon an execution issued by a jus-

tice of the peace on a judgment for less than two hundred dollars. White had been unsuccessful defendant in an action before the justice brought by James McKeever and T. H. Nickerson. Harris was assignee of the judgment and Stocker the sheriff of Marin county into whose hands the writ had been placed. In the present action the plaintiff claimed that in the former one the person assuming to act as a justice of the peace was at the time without official authority.

W. Skidmore for appellant; T. H. Hansen and Lewis Sanders for respondents.

HEYDENFELDT, J.—There is no equity in the complainant's bill. If the judgment of the justice is coram non judice, the seizure of the complainant's property to satisfy it will be a trespass, for which he has a remedy at law.

Let the bill be dismissed.

We concur: Murray, C. J.; Terry, J.

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## DEER CREEK AND FRENCH CORRAL TURNPIKE CO., Appellants, v. WILLIAM B. OAGUE, Respondent.

No. 1099; November 18, 1856.

**Highway.—The Question Whether an Alleged Road franchise is good, or whether the road, through dedication or user, possession and claim of right, belongs to the public, is for the jury.**

APPEAL from Fourteenth Judicial District, Nevada County.

This was an action of trespass brought for an entry, as alleged, unlawful and with force of arms, upon the plaintiff's property and for the tearing away of its toll-gate. The testimony showed that the gate was torn away; that Oague at the time was road supervisor of the township; that shortly before the board of supervisors of the county had given him orders to remove all obstructions from the road running from Marysville to French Corral, which was the course of this road;

that the plaintiff was incorporated before there ever had been a board of supervisors of Nevada county; that the main part of the road had always been a private toll road under control of the court of sessions; that after the last session of that court and before the first meeting of said board of supervisors the plaintiff had become incorporated. Effort was made to charge by testimony a fraudulent incorporation, but the official records were introduced and these showed a compliance with the act authorizing the company's becoming a corporate body.

Francis J. Dunn for appellants; Sargeant & Churchman and McConnell for respondent.

HEYDENFELDT, J.—There is no evidence in the record which goes to support the plea of nul tiel corporation, and that question is therefore not to be considered. The whole controversy in this case turns upon the question of proprietorship; that is, whether the road was a public road or belonged to the plaintiff as a franchise. The determination of this fact depended upon the evidence as to the prior use of the road, its dedication to the public at any period of time, free from tolls or its investiture in the plaintiff, and their continued possession and claim of right. These matters of mere fact were properly left to the jury, under the circumstances detailed in evidence, and the court charged the law correctly. Indeed, there seems to have been no refusal on the part of the court, to give all the charges asked for by the plaintiff, and in the argument it is not urged that the court committed any error except in refusing a new trial, upon the ground that the verdict was contrary to evidence. It has always been the rule of this court not to interfere with a verdict, where the evidence is conflicting. In the evidence set out in the record there is enough to warrant the finding, and we will not disturb it.

Judgment affirmed.

We concur: Murray, C. J.; Terry, J.

BENJAMIN RICHARDSON, Respondent, v. JOHN BIGLER, Appellant.

No. 1070; November 19, 1856.

**Vendor's Lien—Enforcement.—A Vendee has Rights** which must be considered in a resale of property to satisfy the vendor's lien.

APPEAL from Superior Court, San Francisco County.

This was a suit in equity to set aside as fraudulent a sale made on October 10, 1855, by the board of state land commissioners, to enjoin the delivery of a deed following this sale, and to compel a conveyance of the land involved to the plaintiff. The findings of fact of the trial court were to the effect hereinafter set forth, viz.: (1) That at a state sale under the provisions of the act of May 18, 1853, the plaintiff on the twenty-sixth day of May, 1854, became the purchaser of the state's interest in several blocks of land, covered with water, at South Beach, San Francisco, the same making, as subdivided, one hundred and thirty-two lots and the price being twenty dollars per lot. The term of the board selling to him expired May 18, 1855. (2) That he paid the first and second installments of the purchase price, thirty-five per cent, and suspended further payments because of an arbitrary demand made upon him by one of the auctioneers for nineteen hundred dollars additional for alleged expenses incident to the preparation, etc., of the forthcoming deeds, these "expenses" being reckoned at per lot instead of as for one deed. No tender of payment was made after that until the expiration of the term above referred to. The retiring board had left the deed with the auctioneer for delivery on payment, and the auctioneer had left it with his clerk with authority to compromise the expense item, but the clerk had given the plaintiff no intimation of his having this authority. (3) That subsequently the agent of the California land commissioners duly advertised notice to all persons indebted for former state sales that in default of settlement before a named day proceedings looking to forfeiture would be instituted on that day; also that no notice other than this was ever given the plaintiff that a forfeiture and resale of the land he had bought was in

contemplation. (4) That on the day before that of the last state sale had before the beginning of this suit, the plaintiff called upon the agent referred to in order to settle his balance, but was informed then of a new demand upon him, in addition to the old, for advertising, the amount being seventeen hundred dollars. He was told there must be payment of both demands together with the balance of the purchase price before he would be given a deed. The next day he tendered the balance alone to one of the commissioners, and this commissioner rejected the tender and referred him to the agent. (5) That the sale had thereafter was made irregularly and so hastily it was impossible for the assembled bidders to follow on the catalogue the lots indicated there as they were put up. The sales were not by the single lot but by bunches of lots, and often to fictitious persons; all the plaintiff's one hundred and thirty-two lots were sold as one, sold to a clerk in the salesman's office and at an absurdly low figure. (6) That after the sale a friend of the plaintiff's offered this clerk two thousand five hundred dollars for these lots, such clerk having as yet paid nothing on them, but the offer was rejected and five thousand dollars demanded. (7) That the plaintiff had always been ready and willing to pay. The conclusions were that the plaintiff had forfeited no rights, even though having made no tender, and that the auctioneer's charge was unauthorized, illegal and extortionate.

John A. Wills for respondent; Wade & Flower for appellant.

MURRAY, C. J.—The testimony in this cause shows beyond a doubt that the plaintiff's rights have been most improperly compromised, while he was doing all in his power to comply with the terms of the sale on his part, and that, if he did not make the last payment, it was not his fault, but that of the defendants and their agents. Even if this were not the case, inasmuch as he was ultimately liable for any difference in the price of the lots, they being sold on his account, he was interested in having a fair sale of them, which he does not appear by the testimony to have had.

Judgment affirmed.

We concur: Heydenfeldt, J.; Terry, J.

PEOPLE, Respondent, v. WILLIAM V. DAVIS, Appellant.

No. 1262; November 26, 1856.

**Appeals—Absence of Statement and Bill of Exceptions.**—Where there is neither statement nor bill of exceptions, the appeal will not be considered.

**Appeal—Absence of Formal Papers—Certificate by Clerk to Cure.**—A certificate by a clerk of court to the effect that the district attorney agreed to the statement is extra-official and without sanction.

APPEAL from Fifth Judicial District, Tuolumne County.

E. F. Hunter for respondent; Charles L. Scott for appellant.

HEYDENFELDT, J.—There is neither statement nor bill of exceptions contained in the record, and we are therefore precluded from considering the errors assigned. The certificate of the clerk of the district court, stating that the district attorney had agreed to a statement, is extra-official, and has no sanction whatever.

Judgment affirmed.

I concur: Murray, C. J.

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SUSAN E. STEVENSON, Respondent, v. DE WITT C. HASKINS, Appellant.

No. 1210; December 1, 1856.

**Appeal—Harmless Error.**—A Judgment is not to be Reversed for errors disclosed by the record when, from the whole facts legitimately proved, the verdict has as nearly accomplished strict justice as is ever attained in warmly contested litigation.

APPEAL from Superior Court, San Francisco County.

W. W. Crane, Jr., for respondent; James B. Townsend for appellant.

HEYDENFELDT, J.—There are errors disclosed by the record which occurred upon the trial of this cause, but they are not such as render it necessary to reverse the judgment, for upon the whole of the facts which were legitimately proved the verdict attained by the jury has as nearly accomplished strict justice between the parties as is ever attained in a warmly contested litigation.

Judgment affirmed.

I concur: Terry, J.

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WM. M. GATES, Appellant, v. HENRY TEAGUE, Respondent.

No. 1285; December 8, 1856.

**Injunction.—In Cases of Trespass** an injunction is granted only when irremediable injury is imminent.

**Trespass.—In Cases Where Joint Trespassers** are concerned, one action at law is sufficient.

**Injunction.—An Averment in a Complaint That Defendants are Lawless** and irresponsible does not import necessarily that they are insolvent.

**Trespassers—Removal of Quartz—Criminal Prosecution.**—Naked trespassers, without right and insolvent, removing gold-bearing earth are subject to criminal prosecution.

APPEAL from Fourteenth Judicial District, Sierra County.

Dunn, Meredith & Spear for appellant; Foster & Stewart for respondent.

HEYDENFELDT, J.—A court of chancery is always chary of granting injunctions in cases of mere trespass, and the allegations of the bill in this case do not bring it within any rule by which it can be allowed. True, it is said that the injury will be irreparable, but it does not show how. Depriving the complainants of a large amount of gold-bearing earth is a loss, but not irremediable in the sense which will

entitle them to the relief they seek. The averment that the defendants are irresponsible and lawless persons is not such an averment of insolvency as can strengthen the complainants' case: See De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

The averment of a former trial at law fails to show with any accuracy what was the question in dispute and what particular issues were decided by the verdict. Nor can they be entitled to any favor upon the ground of preventing a multiplicity of suits. The defendants, it would seem from the allegations of the bill and the form of this action, are joint trespassers. One action, then, at law, would alone be necessary against all of them. By such action, if they are wrongfully in possession, the possession can be recovered, or if mere occasional trespassers, a recovery can be obtained for the full amount of the injury complained of. Even if in such an action the right was found for the plaintiffs, if in addition thereto the facts disclosed that the defendants were mere naked trespassers, without color of right, and were actually insolvent so as to be unable to respond in damages, I do not see why they could not be punished criminally, and with better effect, than the punishment which would doubtless have to follow an injunction for contempt in disobeying the restraining process of the court.

Judgment affirmed.

I concur: Murray, C. J.

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W. H. GATLIFF, Respondent, v. CRAM, ROGERS & CO., Appellants.

No. 1299; December 8, 1856.

**Bills and Notes.—A Complaint That Does not Show the Plaintiff** to be the holder or indorsee of a bill sued upon, made by defendant in favor of a third person and protested for nonpayment, is bad on demurrer.

APPEAL from Eighth Judicial District, Siskiyou County.

Snelling, Robertson & Stone for respondent; Carter & Hartley for appellants.

TERRY, J.—The complaint in this case does not state facts sufficient to constitute a cause of action. The fact that defendants drew a bill in favor of a third party, which bill was protested for nonpayment, and notice of protest given, certainly would not entitle the plaintiff to recover, without showing that he was the holder or indorsee of the bill. The judgment in this case under the present pleadings would be no bar to a suit upon the same bill by the holder.

Judgment reversed and cause remanded.

I concur: Heydenfeldt, J.

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CHARLES S. PECK, Respondent, v. A. POWELL, Appellant.

No. 1212; December 8, 1856.

**Judgment.—A Verdict for Simply the Recovery of Property does not warrant a judgment for damages in addition.**

APPEAL from Thirteenth Judicial District, Mariposa County.

H. G. Worthington for respondent; Boyce & Harris and Wade & Flower for appellant.

HEYDENFELDT, J.—The verdict of the jury was simply in favor of the recovery of the property sued for, and did not authorize the court in awarding damages against the defendant.

Judgment reversed and cause remanded.

I concur: Murray, C. J.

MACY et al., Respondents, v. EDWIN D. WHEELER et al., Appellants.

No. 1205; December 15, 1856.

**Evidence.—A Statute Making Copies of Records** to be evidence like in effect to the originals if produced does not dispense with the necessity of producing the original record when obtainable.

APPEAL from Tenth Judicial District, Yuba County.

Stephen J. Field for respondents; Goodwin & Wheeler for appellants.

HEYDENFELDT, J.—This case must be reversed on the authority of McCann v. Beach, 2 Cal. 25, and the Executors of Folsom v. Scott, 6 Cal. 460.

Section 21 of the act of March, 1851, gives to copies of papers from the recorder's office the like effect as evidence "as the original could be, if produced." This does not dispense with the production of the original, if it can be obtained. It merely fixes the value as evidence of the copy when from the loss of the original it is necessary to be introduced. There is no attempt by this section to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit.

The counsel for respondents urge that these deeds and power of attorney, copies of which were given in evidence, were immaterial to the decision of the cause, on account of the subsequent testimony of a witness. This may be so, but we cannot know it, unless we had some mode of ascertaining whether the judge who tried the case gave as much weight to the one kind of evidence as to the other.

Judgment reversed and cause remanded.

We concur: Murray, C. J.; Terry, J.

EMMA BERRI, Respondent. v. CHARLES MINTURN, Appellant.

No. 1219; December 15, 1856.

**Bills and Notes.—Possession of a Note is Sufficient to Enable** the holder to sue to enforce payment.

**Mortgage.—The Security Follows the Note Secured;** hence the holder of a mortgage note has the rights of a mortgagee, although there may have been no actual assignment of the mortgage.

**Pleading.—The Purpose of a Complaint** is that the defendant shall be advised of the facts relied upon by the plaintiff to support his action.

**Mortgage Foreclosure—Description of Premises.**—In a suit to foreclose a mortgage the description of the premises may be either contained in a schedule attached to, or incorporated in, the body of the complaint.

**Mortgage Foreclosure—Judgment.—Where a Mortgage Provides** that the percentage be allowed on the sum due and the judgment in foreclosure so allows it, rather than on the value of the property, there is no error.

**Appeals — Frivolous Appeal — Damages.** — An appeal without merit calls for the imposition of damages.

APPEAL from Superior Court, San Francisco County.

Jones, Doyle, Barber & Boyd for respondent; F. M. & H. H. Haight for appellant.

TERRY, J.—We have decided that possession of a negotiable note is a sufficient evidence of ownership to enable the holder to maintain an action upon such note. We have also decided that a mortgage is the incident of the debt which it was made to secure, and that the indorsement and delivery of a note, secured by mortgage, carries with it the security, without the necessity of a formal assignment.

It follows that the plaintiff, being the owner of the note, was entitled to enforce the lien against the mortgaged premises.

The objection that the description of the premises was contained in a schedule attached to the complaint is frivolous. The purpose of the complaint is to give to the defendant

information of all the facts upon which he relies to support his demand. This may be done by attaching to the complaint one or more papers and referring to them, or by copying such papers in the body of the complaint.

The third objection is equally untenable. The judgment of the court is in strict accordance with the terms of the mortgage, which provides that the percentage shall be allowed on the sum due and not upon the value of the premises mortgaged.

The appeal is without merit, and calls for the imposition of damages.

The judgment is affirmed, with five per cent damages and costs.

We concur: Murray, C. J.; Heydenfeldt, J.

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AMMI M. WHITE and MARGARET ANN (His Wife), Appellants, v. HENRY B. WILLIAMS, Respondent.

No. 1222; December 20, 1856.

**Judgment—Setting Aside—Jurisdiction of Trial Court.**—After the expiration of the term during which a judgment is made the trial court is without jurisdiction to set it aside, except in a case where the defendant was not served with process.

APPEAL from Fourth Judicial District, San Francisco County.

Cook, Olds & Cook for appellants; C. M. Brosman for respondent.

MURRAY, C. J.—It has been repeatedly held by us that the courts below have no power to disturb a judgment after the expiration of the term except in the single case where the defendant has not been served with process.

The order appealed from was irregular and is therefore vacated.

We concur: Heydenfeldt, J.; Terry, J.

HENRY DUGAN, Appellant, v. ADAMS & CO. and C. P. NICHOLS, Interveners.

No. 1358; December 20, 1856.

**Appeal.—Where the Findings of the Trial Court are sustained by sufficient evidence they will not be disturbed.**

APPEAL from Sixth Judicial District, Sacramento County.

L. Saunders, Jr., for appellant; R. Beatty and Botts for interveners.

MURRAY, C. J.—If this case had been tried before us as a jury, our judgment upon the facts might have been different from that of the district court; but as the record contains sufficient evidence to support the findings, we do not see how we can disturb them under our former rulings.

Judgment affirmed.

We concur: Heydenfeldt, J.; Terry, J.

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WILLIAM EARL, Appellant, v. THOMAS GEORGE, Respondent.

No. 1143; December 20, 1856.

**Appeal—Jurisdiction—Amount Involved.—That the supreme court may have jurisdiction of an appeal, the record must show the amount in controversy to be over two hundred dollars.**

APPEAL from Placer County.

Charles A. Tuttle for appellant; Miller & Hillyer for respondent.

TERRY, J.—The facts of this case as they appear from the record are not sufficient to give this court jurisdiction.

It does not appear that the amount in controversy exceeds two hundred dollars.

Appeal dismissed.

I concur: Murray, C. J.

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EMANUEL BERRI, Respondent, v. F. B. FITCH and O. B. FITCH, Appellants.

No. 1241; December 20, 1856.

**Appeal—Defective Record not Cured by Certificate of Judge.**—The evidence stated in the record must be agreed on by the parties and signed by the trial judge, and a record defective in this regard is not made good by being certified by the judge to be correct.

**New Trial.—The Admission of Improper Evidence is,** on appeal, no ground for a new trial unless shown to have been objected to.

APPEAL from Sixth Judicial District, Sacramento County.

Clark & Gass for respondent; Wallace & Ralston for appellants.

MURRAY, C. J.—In this case there is no statement of the evidence signed by the judge or agreed on by the parties. There is a certificate of the district judge, after the appeal was taken, that the record is correct; but this is insufficient. He is not required to certify to the correctness of a record, but in the preparation of statements on appeal to make that record which before was not, it is his duty to sign the same, which is certified to us as record.

In addition to this, it is no ground for new trial that the court admitted improper evidence on the trial unless it is shown that the same was objected to.

Judgment affirmed.

We concur: Heydenfeldt, J.; Terry, J.

AMI M. WHITE, Respondent, v. JOSEPH PRADER, Appellant.

December 20, 1856.

**Assault and Battery—Excessive Damages.**—A judgment for five thousand dollars for an assault and battery is held excessive and reversed.

APPEAL from Superior Court, San Francisco County.

Cook & Olds for respondent; Smith & Hardy for appellant.

MURRAY, C. J.—It has been long settled that in actions for assault and battery, damages are a question for the jury, and that courts should be exceedingly guarded in interfering with verdicts in such cases, but it is equally true that the jury are not the uncontrolled judges of the propriety of their own verdicts, and it is the duty of the courts in aggravated cases, where the damages given are so excessive as to warrant the presumption of malice or prejudice, to interfere and set them aside. This power we have seldom been called upon to exercise, but whenever a proper case has been shown, we have not refused to grant a new trial. There is no sanctity about the verdict of a jury that would warrant a court in standing by and allowing a party to be ruined by their ignorance, caprice or prejudice. Having premised thus much as to the power of courts, we will proceed to examine the facts of the case.

It appears that the defendant, while in a state of intoxication, was found in the premises of the plaintiff (a cellar for bottling ale and porter). Whether his inebriety was occasioned by liquors obtained there or at some other establishment does not appear. While lying in a state of stupefaction, the plaintiff approached him and tried to awaken him, and finally succeeded in doing so by pushing him with his foot upon the head and shoulders. The defendant, aroused by this process (not very gentle, to say the least of it) and scarce awake, saw the plaintiff standing over him, kicking or pushing him, and, raising to his knees, uttered one of the slang phrases of the day, the meaning of which

is that he was not to be trifled with or insulted. Thereupon, the plaintiff made a rush at him and struck at him, thinking, as the proof most abundantly shows, that the defendant was so drunk he would have an easy victory. But it seems that "he had reckoned without his host," and the defendant soon changed the odds of the battle, and the plaintiff got considerably worsted in the encounter—so much so, that he was confined to his bed for some two weeks and put to two hundred dollars expense for medical services.

For this unfortunate termination of the plaintiff's pugilistic essay the jury have charged the defendant the sum of five thousand dollars. Heretofore, the victor in such controversies has generally been the gainer; but it appears that the rule has been changed in this instance, and the jury have awarded damages to the unsuccessful party—whether out of sympathy at his failure or for the mortification that he experienced in not being able to cope successfully with a drunken man must, as a matter of course, ever remain in doubt. Now, in point of law, the assault by the plaintiff and his attempt to strike the defendant was a sufficient excuse for the appellant to defend himself, although that defense should have proceeded no further than was actually necessary; but even if the defendant forgot himself and in a moment of passion struck more blows than were necessary to repel the attack, this is no ground for so unrighteous a verdict. It is not shown that the plaintiff received any permanent injuries or that his time for two weeks was worth five thousand dollars. It is not shown that he has been injured socially by this affair or that there were any circumstances of aggravation warranting so large a verdict.

If the plaintiff had desired, he might have had the defendant peaceably removed by an officer, or he might have employed sufficient force to eject him, but he had no right to resort to violence, particularly as he seemed to be engaged in a business the necessary result of which was to bring men to the condition of the defendant.

From an examination of the whole case we are of opinion that the damages are excessive, unconscionable and unjust.

The judgment is reversed and the cause remanded.

I concur: Terry, J.

JACOB MEYER, Respondent, v. SOLOMON ADLER, Appellant.

No. 1088; December 20, 1856.

**Homestead—Occupancy—Family Residence.**—To constitute a homestead there must be actual occupancy, with intent to devote the property to the purpose of a family residence.

APPEAL from Superior Court, San Francisco County.

Haight & Garey for respondent; Sydney V. Smith for appellant.

TERRY, J.—The question involved in this case has been decided by this court in the case of Taylor v. Hargous, 4 Cal. 268, 60 Am. Dec. 606, and Hayden v. Penny, decided at the July term, 1856. In the latter case we held "that the homestead is the family residence, and in order to constitute a homestead there must be an actual occupancy, with the intention of dedicating the premises to such purpose."

In the case under consideration there was no occupation of the premises by the family nor any act which evidenced an intention to devote them to the purposes of a residence; on the contrary, the character of the building erected and the disposition made of it prove conclusively that it was intended for an entirely different object.

Judgment reversed.

I concur: Murray, C. J.

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O. W. SPENCER, Respondent, v. DANIEL H. BARNEY, Appellant.

No. 1211; December 20, 1856.

**Appeal—Taking for Delay—Damages.**—An appeal taken manifestly for delay calls for the imposition of damages.

**Mechanic's Lien—Priority Over Mortgage.**—The lien of a materialman under a contract to deliver lumber from time to time as wanted and paid for is superior to a mortgage on the premises only in respect of lumber delivered and not paid for at the time of the recording of the mortgage.

APPEAL from Superior Court, San Francisco County.

This was an action by the assignee of a mortgage to foreclose the latter. The assignment was of a time preceding the maturity of the note secured. The matter set up as a defense was in effect that fraud and misrepresentation had been used in procuring the execution of the note and mortgage; in particular, that the defendant held the naked possession of land in San Francisco covered by an alcalde grant under which the mortgagee claimed title, and that while the defendant so held the other's agent called upon him, represented his title to him, and proposed to compromise by a sale instead of any resort to a suit for possession; whereupon, the defendant consenting, the sale was made, the defendant giving the note and mortgage to secure payment of the purchase money. He averred also that he found the land was covered by another title also, the Simantaur title, wherefore the claim of fraud. One Ford was joined as defendant, as an encumbrancer, and answering set forth a lumberman's lien in favor of Soule and Page, of which the said defendant Ford was assignee, for lumber delivered from time to time to Barney, who was building on the premises and ordered the lumber as it was needed. The mortgage was recorded after the early deliveries but before the last.

Brosnan & Grost for respondent; E. L. B. Brooks for appellant.

MURRAY, C. J.—The facts relied on in this case, to establish fraud in procuring the execution of the note and mortgage, were insufficient and the evidence was properly excluded.

As to the mechanic's or lumberman's lien, it is not shown that the materials were delivered under any contract for such a quantity or so much lumber; but they appear to have been delivered from time to time as they were needed and purchased by the defendant; the lien therefore only extends to the amount so delivered, at the time of recording the mortgage. On the whole, we regard this as a delay case.

Judgment affirmed, with ten per cent damages.

We concur: Heydenfeldt, J.; Terry, J.

MARIA ROSALIA ROBLES, Respondent, v. JOSE THEODORE ROBLES, Appellant.

No. 1320; February 24, 1857.

**Appeal—Order Denying Continuance—Absence of Affidavits.**—An appeal from an order denying a continuance will not be considered when the affidavits upon which the application was made are not embodied in the statement or bill of exceptions.

APPEAL from Third Judicial District, Santa Clara County.

W. T. Wallace for respondent; W. W. Stow for appellant.

TERRY, J.—The only point made in this case is upon the refusal of the court to continue the cause upon the application of the defendant.

The affidavits upon which the application was made are not embodied in the statement or bill of exceptions, and cannot, therefore, be considered.

Judgment affirmed.

I concur: Murray, C. J.

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VICTOR MOLLE, Respondent, v. JACOB KOHLBERG & CO., Appellants.

No. 1415; March 3, 1857.

**Continuance — Diligence. — An Application for a Continuance** should be denied on a showing that the applicant has been lacking in diligence.

APPEAL from Fifth Judicial District, Calavaras County.

Mount & Buchanan for respondent; W. L. Dudley, R. Beatty & Botts for appellants.

TERRY, J.—The only error assigned is the refusal of the court to continue the cause on application of defendants.

We think the continuance was properly refused. The answer was filed on the 6th of June, 1856, and no effort was made to procure the testimony until the 2d of October, when a subpoena was issued for a nonresident witness. This was not such diligence as would authorize a postponement of the cause.

Judgment affirmed.

I concur: Burnett, J.

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JONATHAN MORSE, Respondent, v. MICHAEL McCARTY, Appellant.

No. 1119; March 3, 1857.

**Trial.—An Objection to Testimony, Made by a Defendant Appearing** himself to have no real interest in whether the testimony is admitted or not is to be overruled, although the objection might be good if made by some other defendant in the same cause.

**Homestead—Mortgage.—When the Wife Does not Join** with the husband in the execution of the instrument a mortgage by him of the homestead is a nullity.

APPEAL from Superior Court, San Francisco County.

This was an action to foreclose a mortgage. The facts were these: On April 7, 1851, A. M. Cooper conveyed by deed to Michael McCarty. On December 16, 1853, McCarty, being then a married man and the premises being occupied as the family homestead, executed a mortgage to William C. Gray in which mortgage the wife did not join. On October 23, 1854, McCarty and wife joined in a note and mortgage to the plaintiff. On February 6, 1855, McCarty and wife deeded to Martha Newman, and the latter on the same day paid off and had satisfied still another mortgage, one made and delivered by McCarty to one George A. Cheenery on the 30th of January, 1854. All the deeds and mortgages had been duly recorded; the premises had never exceeded in value five thousand dollars.

G. F. & W. H. Sharp for respondent; C. Burbank for appellant.

TERRY, J.—In the cases of Cook v. McChristian, 4 Cal. 23, and Taylor v. Hargous, 4 Cal. 268. 60 Am. Dec. 606, this court held that no specific acts were required to indicate the selection of a homestead, and that occupancy by the family was presumptive evidence of the appropriation of the premises as a homestead, and was notice to all the world. It was also held that when a place, by the residence of the family, once acquired the character of a homestead, this character cannot be devested except by the joint act of husband and wife in the manner provided by law.

From the record in this case, it appears that the premises covered by Gray's mortgage were, before the execution of said mortgage, the homestead of McCarty's family. The deed, not having been signed by the wife of the mortgagor, was a nullity.

The question as to the admissibility of evidence to supply the omission in the certificate of acknowledgment to plaintiff's mortgage is one in which we think defendant Gray had no interest, and we can see no advantage which he would derive from defeating plaintiff's lien.

As no objection to the testimony was made by the parties interested, it was properly admitted.

Judgment affirmed.

I concur: Murray, C. J.

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S. M. JOHNSON, Appellant, v. W. W. REYNOLDS, Respondent.

No. 1413; March 10, 1857.

**Execution.—Things in Action are Property so as to be subject to levy in execution.**

APPEAL from Eleventh Judicial District, El Dorado County.

Sanderson & Hewes for appellant; Robertson & Hume for respondent.

TERRY, J.—The only question presented by the record is whether, under our statute, things in action are property and subject to be taken in execution.

This point was fully considered in the case of Adams & Co. v. Hackett & Casserly, [7 Cal. 187], decided at this term, and upon the authority of that case the judgment of the court below is reversed and cause remanded.

I concur: Burnett, J.

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PEOPLE, Respondent, v. JOHN GODKINS, Appellant.

No. 1321; March 10, 1857.

**Appeal—Defective Bill of Exceptions.**—When the appeal is based solely on errors during the trial and instructions given the jury, and the bill sets out neither the evidence nor the instructions, judgment is to be affirmed.

Sessions, San Francisco County.

P. B. Manchester for appellant.

TERRY, J.—There is in the record no settled or agreed statement of the case nor bill of exceptions setting out the evidence. The only exception in the record is the refusal of the court below to grant a new trial, on account of errors occurring at the trial and erroneous instructions given by the court, but as the bill sets out neither the evidence nor the instructions, we cannot review the decision of the judge below: People v. Lafuente [6 Cal. 202] and People v. Lockwood [6 Cal. 205], April term, 1856.

Judgment affirmed.

I concur: Burnett, J.

MILES DORAN, Appellant, v. THOMAS WALKER, Respondent.

No. 1475; June 8, 1857.

**Instructions.—Where Instructions Given Embrace substantially** the points of those refused, the refusal is no error.

APPEAL from Fourteenth Judicial District, Nevada County.

Frank Dunn for appellant; A. B. Dibble for respondent.

BURNETT, J.—This action was for damages for diverting water from the mining claims of plaintiffs. On the trial plaintiffs asked the court to give some nine instructions, all of which were given but the third, fourth and seventh. There were three other instructions given, at whose request does not appear. The instructions given embody substantially the same points embraced in those refused. The verdict of the jury was not against the evidence, and the court did not err in refusing a new trial upon that ground. Upon the whole case, we can see no error in the action of the court below, and the judgment is therefore affirmed.

I concur: Murray, C. J.

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JOHN H. EASTERLING, Respondent, v. POWER & BLODGETT, Appellants.

No. 1495; June 22, 1857.

**Appeal—Order Denying New Trial.—The Appellate Court is Reluctant** to reverse the denial of a motion for a new trial made on the ground that the findings were contrary to the evidence.

**Appeal.—An Order Denying a Motion for a New Trial, where** the evidence below was without material conflict and the findings by the court were contrary to the weight of it, is not to be sustained.

APPEAL from Tenth Judicial District, Yuba County.

John T. McCarty and C. H. Bryan for respondent; E. D. Wheeler for appellants.

BURNETT, J.—This cause was tried before the district court, by consent of parties, without a jury. The finding and judgment of the court were for the plaintiffs, and the defendants moved for a new trial upon the ground that the finding was contrary to the evidence. The court overruled the motion for a new trial and the defendants appealed.

It is always with great reluctance that this court will reverse the decision of the court below refusing a new trial upon the ground that the finding of the judge or the verdict of the jury is contrary to the evidence. But in a clear case it is our duty to do so.

In this case we can see no testimony to support the finding. The testimony, when carefully compared, does not materially conflict, and the weight of it is clearly with the defendants.

Judgment reversed, cause remanded, and a new trial ordered.

I concur: Murray, C. J.

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## PEOPLE, Respondent, v. JAMES LYONS and ROBERT POOR, Appellants.

No. 1680; November 9, 1857.

**Criminal Law—Accomplice Testimony—Instructions.**—Where an accomplice has testified against the accused, the latter is entitled to have the judge instruct the jury that such evidence must be corroborated if it is to be believed.

**Criminal Law—Waiver of Rights by Accused.**—If the Counsel for an accused person answers "no" to the court's inquiry as to whether he has any instructions he wishes to be given the jury, this is an express waiver, and not within the rule against inferences of waiver of rights in criminal cases.

APPEAL from Fifth Judicial District, Tuolumne County.

Attorney General for respondent; Baker & Moore for appellants.

BURNETT, J.—The prisoners were convicted of murder in the first degree. In support of the prosecution the evidence of one Wallace, an accomplice, was received. The district judge gave certain written instructions to the jury, and then asked the counsel for the prisoners if they wished any other charge, to which they replied in the negative. After the charge was given, and while the jury were in the act of retiring, the counsel for the prisoners excepted to the instructions given.

It is objected that the judge did not charge the jury that a conviction could "not be had upon testimony of an accomplice by such other evidence as should tend to connect the defendants with the commission of the offense": Wood's Dig. 299, sec. 375.

At common law the unsupported testimony of an accomplice was strictly sufficient, but in practice it was usual for the judge to advise the jury to acquit: 1 Phil. Ev. 31; 2 Russ. 960; 1 Dem. 82; 22 Pick. 397; 3 Brit. C. C. 54.

But though this was the usual practice, yet it was discretionary with the judge who presided at the trial, and it would not have been error to omit such a charge: 1 Phil. Ev. 32; 3 Brit. C. C. 54; 2 Russ. 960.

It must be conceded, however, that under the positive provisions of our statute, already quoted, it would be the duty of the judge presiding at the trial in which the testimony of an accomplice was received to give such instruction to the jury, if required by the prisoner. And it might admit of some doubt whether it would not be the duty of the court to give such instruction when it was neither asked nor refused by the prisoner. Of this, however, we express no opinion. But the question in this case is whether the prisoners could expressly waive the right. They were expressly asked if they wished any other charge, and replied that they did not. It would seem that under such circumstances they would have no right to complain. As a prisoner may plead guilty, he may certainly waive his right to such an instruction.

The instructions, as given by the court, were correct propositions of law, and applicable to the particular case, so far as they went. The testimony of the accomplice was fully corroborated, and the jury were amply justified in their verdict. The prisoners had a fair trial, and we can find nothing in the proceedings that could have done them injustice. We are required by law to "give judgment without regard to technical error or defect, which do not affect the substantial rights of the parties": Wood Dig. 309, sec. 499; People v. Moore [8 Cal. 90], July, 1857.

We express no opinion as to whether the exception to the charge of the court came too late. It is not necessary to determine that point in this case.

Judgment affirmed.

I concur: Field, J.

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A. K. GRIM, Respondent, v. P. MANNING, Appellant.

No. 1662; November 30, 1857.

**Appeal—Findings.—The Written Opinion of the trial court is not a "finding."**

APPEAL from Sixth Judicial District, Sacramento County.

Harmon, Sunderland & Stanley for respondent; Long & Morrison for appellant.

TERRY, C. J.—The petition for a rehearing in this case contains only a reiteration of the points argued in the appellant's brief which was filed on the 27th of October. At that time there was in the record no finding of facts by the judge below. The counsel in his brief seems to have treated the written opinion of the district judge as his finding, and his argument conclusively established the point that the opinion of the judge was not a sufficient finding of facts under the former rulings of this court.

The counsel seems to have overlooked a rather important fact mentioned in the opinion of this court, to wit, that by

consent of parties an amended or supplemental record had been filed which does not contain such finding.

We presume the counsel who presented the petition for a rehearing was ignorant of the fact that such supplemental record had been filed, as we think a perusal of the finding of facts contained in it would satisfy the counsel, as it did the court, that his assignment of errors was not supported by the record.

Rehearing denied.

I concur: Burnett, J.

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## IGNACIO DEL VALLE, Respondent, v. THOMAS W. MORE, Appellant.

No. 1720; October 18, 1858.

**Judgment by Default—Grounds for Setting Aside.**—A judgment for the plaintiff, entered upon the failure of the defendant to appear at the trial, is not to be set aside on a showing by defendant that his nonappearance was by reason of his being "extremely and necessarily busy on his ranch taking care of his cattle."

APPEAL from First Judicial District, Los Angeles County.

Scott & Lander for respondent; Hepburn & Sanders for appellant.

FIELD, J.—When this case was called on the calendar the defendant failed to appear and the plaintiff had judgment. The defendant moved to set aside the judgment, alleging as an excuse for his neglect to appear at the trial "that he was extremely and necessarily busy upon his ranch in taking care of his cattle." We know of but one precedent when the possession of cattle and attention to them was offered as an excuse for nonattendance, and in that case it was held unavailing.

We feel the less reluctance in affirming the order denying the motion inasmuch as the defendant states in his affidavit

that he is abundantly able to pay and satisfy the judgment. We are of opinion that he can safely pay it.

Judgment affirmed, with ten per cent damages.

We concur: Baldwin, J.; Terry, C. J.

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CHASE, Appellant, v. RIES et al., Respondents.

No. 2169; November 8, 1858.

**Appeal.—Liability on an Appeal Bond Does not Attach** upon reversal of the judgment appealed from with directions to enter a different judgment.

APPEAL from Fourteenth Judicial District, Sierra County.

Van Clief & Steward for appellant; Hall & Musser for respondents.

TERRY, C. J.—This is an action on an appeal bond executed by defendants conditioned to pay the judgment appealed from if the same should be affirmed by the appellate court.

It appears from the record that the judgment appealed from was reversed, with directions to the court below to enter a different judgment; consequently no liability attached to defendants under the conditions of the bond.

Judgment affirmed.

We concur: Baldwin, J.; Field, J.

PEOPLE ex rel. SAN FRANCISCO GAS COMPANY, Respondent, v. BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, Appellant.

No. 2226; November 17, 1858.

**Mandamus—Direction to Audit Claims.**—A court's mandate to the board of supervisors of a county directing it to proceed to audit certain claims is not to be taken as directing an audit that must be favorable to the petitioner.

Mandamus. San Francisco County.

Haight & Williams, for respondent; F. P. Tracy for appellant.

BALDWIN, J.—In this case we understand the mandamus merely to direct that the supervisors shall proceed to audit the claims of the relator in this proceeding. This does not necessarily require of the board to allow the account. They have a discretion in respect to their action in this regard, and though they are compelled to proceed to act on the subject matter of the claim, yet the mandamus does not control or prescribe the mode or determine the result of their action.

The judgment is affirmed.

I concur: Terry, C. J.

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PEOPLE, Appellants, v. JOHN SCOTT and JOHN WRIGHT, Respondents.

No. 2296; February 8, 1859.

**Criminal Law—Accomplice—Officer Detecting Crime.**—One who aids in the commission of a crime effected through violence cannot afterward escape responsibility as an accomplice by claiming he was a peace officer at the time, acting with a purpose to detect and convict the criminal.

**Criminal Law—Accomplice—Police Officer.—Where Evidence** against a person charged with a crime is given by a police officer

who aided in the act charged from a concealed motive of afterward giving such testimony, the defendant is entitled to have the court instruct the jury that the witness was an accomplice and his evidence, without corroborating proof to support it, insufficient to convict.

APPEAL from Sacramento County.

District Attorney for appellants; Hardy, Curtis & Warters for respondents.

BALDWIN, J.—The court erred in its instructions to the jury that the officer who instigated or was immediately connected with a robbery was not to be considered an accomplice in the crime. For this, in effect, was the charge. In this case it seems the witness planned the robbery and held the victim while another struck him on the head with a stone, and assisted in robbing him and divided the money the next day. The pretext that in all this he was merely acting as a police officer and committed this crime or did these acts as a detective is too thin a disguise to exonerate him from criminal responsibility. Whatever may be the rule in relation to apparent participation of a party in a felony, for the purpose of procuring proof against malefactors, it is very clear that it does not embrace a case of this sort—where personal violence is committed in pursuance of a plan set on foot and accomplished by the immediate agency of the witness. As well might a witness seek to shield himself from responsibility for murder upon the pretext that he planned and executed a homicide in company with a gang of murderers only for the patriotic purpose of discovering and convicting the assassins.

The court should have instructed the jury that the witness was an accomplice if they believed these facts, and that his evidence, without corroborating proof in support of it, was insufficient for a conviction of the prisoner.

The judgment is reversed and this cause remanded.

We concur: Field, J.; Terry, C. J.

R. SOMERSET DEN, Appellant, v. CHARLES FERNALD, Respondent.

No. 2215; February 8, 1859.

**Judicial Officer—Liability for Acts.**—An act of any sort by a judicial officer, provided it is judicial in character, is not a thing the officer can be made to answer for in an action by the person conceiving himself aggrieved.

APPEAL from Santa Barbara County.

J. A. McDougall, for the appellant.

BALDWIN, J.—Plaintiff sues defendant, who is alleged to be the judge of the county court of Santa Barbara, for issuing an attachment for contempt committed against the defendant, as commissioner of the United States court. The particular facts are not set out. The general averment is made that the arrest was unjust and illegal, and that the defendant issued the warrant or attachment for the arrest of defendant [plaintiff] without authority of law.

The complaint does not aver any want of authority in the plaintiff as United States commissioner to cause the defendant to be arrested for contempt; though it asserts in general terms that the plaintiff issued this warrant without authority of law. This may be, and yet the defendant not be liable to an action; for if the defendant, acting judicially, had any power in the premises, he could not be held responsible civiliter for any erroneous proceedings in the exercise of such jurisdiction. It is not averred what description of commissioner the defendant was, or under what circumstances the alleged contempt was committed, or in what it consisted, or what were the proceedings connected with the order of arrest. Enough is disclosed to show that the action complained of—whatever it was—was judicial, and it is to be presumed, in the absence of any showing to the contrary, that it was regular; certainly not beyond the jurisdiction of the officer.

The complaint for this and other grounds was demurrable.

The judgment is affirmed.

I concur: Terry, C. J.

PEOPLE, Respondent, v. J. P. O'HARA et al., Appellants.

No. 2295; February 8, 1859.

**Criminal Law—Right of Defendant to Written Instructions.**—The defendant in criminal cases enjoys a right by statute to have the court's instructions in writing, to insure their preservation in authentic and accurate form.

**Criminal Law—Waiver of Rights—Presumption.**—There is, in criminal cases, no presumption to the effect that the defendant has waived a right; the record must show the waiver.

APPEAL from Sacramento County.

District Attorney for respondent; G. L. Waters for appellants.

BALDWIN, J.—In this case the instructions of the court were given orally, and within the case of People v. Demint, 8 Cal. 423, the court had no power to give such instructions. We are asked to review that decision. We think it correct. The right to have the instructions in writing, so as to preserve them in an authentic form, and to secure an entire accuracy of statement is given by the statute; and there is no presumption indulged in criminal cases that any right is waived. The record must show the waiver. We think the policy is good, and there can or ought to be no difficulty in the court or the district attorney's seeing that the proper entry is made on the records whenever this right is waived.

The judgment is reversed and cause remanded.

We concur: Field, J.; Terry, C. J.

FRANK BAKER, Respondent, v. DAVID SCANNELL et al., Appellants.

No. 1754; April 2, 1859.

**Injunction.--Where the Charges Set Out in a Bill for a permanent injunction are fully denied by the answer and accompanying affidavits, the denials being as circumstantial and positive as the charges, the injunction should be dissolved.**

APPEAL from Fourth Judicial District, San Francisco County.

S. V. Smith for respondent; Jones, Lake & Boyd for appellants.

BALDWIN, J.—The injunction in this case should have been dissolved on the answers and affidavits. The main question is as to the fraud in the making of the note of Watson to Clement, and the allegations of the bill in this respect are fully denied. The denials, certainly, are quite as circumstantial and positive as the charges.

The order is reversed and the injunction dissolved, and cause remanded.

I concur: Field, J.

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G. R. PARBURT, Respondent, v. W. P. MONROE, Appellant.

No. 2301; April 9, 1859.

**Appeal.—A Frivolous Appeal Manifestly Intended for Delay only calls for an affirmation of the judgment, with damages.**

APPEAL from Fifteenth Judicial District, Colusa County.

Parburt for respondent; Raynard & Sanders for appellant.

TERRY, C. J. This was a proceeding to foreclose a mortgage upon real estate. A demurrer to the complaint was inter-

posed and was properly overruled, and no answer having been filed within the time allowed by the court upon overruling the demurrer, a judgment was entered pursuant to the prayer of the complaint.

After a careful examination of the record, we are satisfied that the appeal is frivolous and was intended merely for delay; the judgment is therefore affirmed, with ten per cent damages.

I concur: Baldwin, J.

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## M. L. CAVERT, Administrator, Appellant, v. MARGARET ALDERMAN, Respondent.

No. 2212; June 11, 1859.

**Partnership.—The Right of a Surviving Partner to Settle the Affairs** of the firm results wholly from the joint interest whereby he might claim to hold the assets as if he were the owner; no such right inheres in one who has sold his entire interest to his copartner, even though he may not yet have received the purchase money.

**Administrator—Claims of—Presentation.**—The statutory requirement that in the settlement of estates the claim of an administrator, not growing out of his official position, must be presented to the probate judge for allowance, was intended merely as a protection and authentic voucher for the administrator on his settlement.

**Administrator—Claims of—Failure to Present.**—An administrator is not precluded from his credit, in respect of any claim he may have unofficially against the estate, by his failure to have the claim allowed in the first instance by the judge of probate; but may show the existence and justice of the claim when settling his accounts, being prepared with his proofs in case he is challenged by the distributees.

APPEAL from Probate Court, San Francisco County.

L. Aldrich for appellant; W. W. Crane, Jr., for respondent.

BALDWIN, J.—Cavert, the appellant, was the administrator of this estate. In 1852 Alderman and Cavert were mercantile partners under the firm of Alderman & Co., and

had been for some time previously. In 1852 it seems that Cavert sold out his interest to Alderman for five thousand dollars, payable at twelve months, with interest at three per cent, but it was expressly agreed that the name of Cavert should continue in the firm and the firm business go on under the old name. Shortly afterward Alderman died and Cavert took administration on his estate. He claims the right as the surviving partner to hold the assets and wind up the firm business, it being unsettled and debts due at the time of the death of the intestate. He also claims the right to retain this debt of five thousand dollars and interest out of the assets. The claim was not presented to the probate judge for allowance.

The right of a surviving partner to retain possession of the firm property and settle up the firm business is a familiar rule of the common law, and the principle is incorporated into our own statute. It is said, however, that this rule has no application to this case, but is limited to an actual partnership in which the survivor has a beneficial interest in the estate. It is argued, on the other hand, that this is not the case of a mere liability as partner, which occurs where one partner withdraws from the firm, but omits to give notice, and thus is held bound for the debts to persons ignorant of the change of the firm; but that it is the case of an express agreement for the continuance of the old member in his relation of associate in the concern; that as to the creditors of the firm the associate would be a partner, subject to all the liabilities of that relation; and he would have a right to insist upon the performance of the duties of the other associate necessary to his protection, and to the application of the firm property to the firm debts, and that if held liable as a partner, he is entitled to the protection of one.

This reasoning is more specious than sound. There is little difference between Cavert agreeing expressly to let his name be used in a business in which he had no interest, and his suffering it, by neglect or otherwise, to be so used. He was not a partner. There is no definition of partnership which would include him. There can be no partnership without a community of interest in the profits, and he had no share either in profits or losses, nor any interest in the capital stock or business. Story on Partnership, section 18, thus defines

a partnership: "Every real partnership so intended by the parties themselves imports ex vi termini a community of interest in the profits of the business of the partnership, that is to say, a joint and mutual interest in the profits thereof or a communion of profits. And this is of the very essence of the contract; for, without this communion of profits, a partnership cannot, in the contemplation of the law, exist." The error of the argument on the side of the appellant is in supposing that Cavert was a partner at all. Not having any joint interest with Alderman, he could not claim to hold the assets as if he were owner. The right of the surviving partner results from this title. If he has no ownership he cannot avail himself of this matter of representation to show title to the assets as surviving partner when he was not. If this were so, all a man has to do to entitle him to take possession of the assets of a firm is to hold himself out as a partner. But it is the fact, not his representation of it, which gives this right to the man who asserts it.

The other question is more difficult. So far as the five thousand dollar debt is concerned, we do not see how it can be considered a firm debt. As we understand it, it was an individual debt due from Alderman to Cavert. The question, then, is this: Can an administrator, holding a debt against the estate of his intestate, pay himself and claim a credit when he has never presented his claim for allowance to the probate court?

The statute (C. L. 395, sec. 130) provides that every claim against an estate shall be presented within ten months after publication of notice to the executor or administrator, and if not so presented, it shall be barred forever. Subsequent sections of the statute provide that the claim shall be supported by affidavits, etc.; that when presented to the administrator he shall indorse his allowance or rejection of it; if allowed, it shall be presented to the probate judge for his approval, who shall, in the same manner, indorse upon it his allowance or rejection. Section 145 provides that if the executor or administrator is himself a creditor of the testator or intestate, his claim, duly authenticated by affidavits, shall be presented for allowance or rejection, and its allowance by the probate judge shall be sufficient evidence of its correctness.

The object of these provisions, except the last, as was held in Deck's Estate v. Gherke, 6 Cal. 667, was to prevent the estates of decedents from being wasted in useless litigation. The administrator paying a debt at common law took upon himself the risk of its being a proper charge upon the estate; and our statute, by making the allowance of the administrator and of the probate judge a sufficient voucher for the payment, obviated the necessity of suit for the protection of the administrator. Deck v. Gherke is supported by Wren v. Span, 1 How. (Miss.) 119; Campbell v. Young, 3 How. (Miss.) 303; Wilson v. Walker, 3 Stew. (Ala.) 216; Brown v. Hill, 27 Miss. 51; Rawlins v. Poindexter, 27 Miss. 64.

In Knight v. Godbolt, 7 Ala. 304, it is held that an administrator is entitled to retain assets for any just debt due to himself, although within the bar of the statute of limitations, if it be without the period when presumption of payment would arise; and such is the common-law rule, though our statute forbids the payment of a debt barred by the statute of limitations.

Regarding, then, this provision requiring the presentation of the claim of the administrator to the probate judge for allowance not as an absolute inhibition of payment or of the recognition of the claim as a valid charge on the estate unless the claim be so allowed, but merely as a protection and authentic voucher for the administrator on his settlement, we think that the administrator is not precluded of his credit from the failure to have his claim allowed in the first instance by the probate judge. This failure undoubtedly throws upon him the burden of showing the existence and justice of his claim. But this he can as well do when he comes to settle his accounts—when the proofs are challenged, and the distributees can have a fair opportunity of contesting with him—as he could do on an ex parte proceeding before the judge.

The distributees have a right to compel him to full settlement and to an explicit and detailed statement of his accounts. He must show every single item of expenditure and of receipt, with the dates and character and amount, and produce full and satisfactory proof of his disbursements and that they are proper charges against the estate. If he has undertaken to pay debts of the estate not authenticated, he has done it at his own risk, and must make satisfactory proof

that he has made the payments and that they were just and legal debts. If he has used the money of the estate, he ought to be made to pay interest, and so if he has unreasonably delayed the settlement of his accounts.

The judgment is reversed and cause remanded, to be proceeded with below in accordance with this opinion.

Ordered accordingly.

I concur: Terry, C. J.

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PEOPLE, Respondent, v. JOHN JENKINS, Appellant.

No. 2495; October 4, 1859.

**Appeal.—No Exception can be Regarded on Appeal Unless its relevance and materiality is disclosed by the record.**

APPEAL from Seventh Judicial District, Plumas County.

Attorney General for respondent; Beatty, Cox & Baldwin for appellant.

COPE, J.—The points made in this case by the counsel for the appellant arise upon exceptions to the giving and refusing of certain instructions. As the case is presented to us, these exceptions cannot be considered. The instructions were addressed exclusively to the evidence, and no part of the testimony appears in the record. No exceptions can be regarded by us unless its relevance and materiality be disclosed by the record. The judgment is affirmed, and the court below will designate a day to carry its sentence into execution.

I concur: Baldwin, J.

JOHN P. MYERS, Respondent, v. J. K. LIENING, Appellant.

No. 2302; November 4, 1859.

**Appeal—Amount Involved.—Appeal Does not Lie in cases** where the amount involved is less than two hundred dollars.

**Appeal—Lack of Exceptions.—Where There was No Motion** for a new trial in the court below, and the instructions, for alleged error in which the appeal has been taken, were not excepted to, the appeal is to be dismissed.

From Colusa County.

A. F. Buckner for respondent; Weaver & Curtis for appellant.

BALDWIN, J.—There are two sufficient reasons why we cannot take notice of the errors assigned by the appellant: 1. The judgment below is for less than two hundred dollars—and we have no jurisdiction; 2. There was no motion for a new trial below and no exception taken to instructions—for alleged error in which the appeal is taken.

The appeal is dismissed.

I concur: Field, C. J.

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JAMES R. HEAD, Appellant, v. F. E. BARNEY, Respondent.

No. 2450; November 25, 1859.

**Appeal—Report of Referee.—In the Absence of a Statement of Facts,** a judgment on a referee's report which contains a finding in the alternative, leaving the court to determine the amount of the judgment, must be sustained.

APPEAL from Fifth Judicial District, Amador County.

H. Cook for appellant; Barney & Cope for respondent.

BALDWIN, J.—There is no statement of facts in this case. The referee was directed to report a judgment as to the amount in Receiver Barney's hands. He reported judgment for the sum of three hundred dollars and upward and then reported a finding in the alternative as to another sum; leaving the court to determine whether judgment should be entered for this sum. Neither in the report nor elsewhere do we see enough to enable us to judge whether the court erred in refusing to give judgment for this latter sum.

We cannot, in the absence of a statement, determine this matter.

The costs, if not in the discretion of the court on this issue with the receiver, seem to be disposed of by a stipulation in the record providing that each party should pay his own costs. Nor is it shown the costs are sufficient in amount to give this court jurisdiction.

The judgment is affirmed.

I concur: Field, C. J.

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THOMAS I. HAYNES, Respondent, v. WILLIAM MEEKS, Appellant.

No. 2591; November 28, 1859.

**Appeal—Reversal—Remand for Further Proceedings.**—A reversal of a judgment and remanding for further proceedings does not import that the trial court shall, from the facts originally found, enter judgment in favor of the party not favored before.

APPEAL from Twelfth Judicial District, San Francisco County.

Shattuck, Spencer & Reichert for respondent; Crittenden for appellant.

COPE, J.—This is an action of ejectment. The cause was tried in the court below without the intervention of a jury, and resulted in a judgment for the defendant. The plaintiff

appealed to this court, and the judgment was reversed and the cause remanded for further proceedings. A judgment for the plaintiff was thereupon rendered by the court below upon the facts as originally found. The defendant appeals, and claims that under the judgment of this court he was entitled to a new trial. This point is certainly well taken. The judgment in its original form contained a specific direction to the court below to render a judgment for the plaintiff upon the facts found, but it was afterward modified and this direction omitted. The intention clearly was that the case should be retried upon its merits.

The judgment is reversed and the cause remanded for a new trial.

I concur: Field, C. J.

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CHARLES W. KNOWLES, Respondent, v. DAVID CALDERWOOD, Appellant.

No. 2374; November 29, 1859.

**Appeal.—Where the Statement is so Imperfect that it is impossible to ascertain the merits, the judgment will be affirmed.**

APPEAL from Fourth Judicial District, San Francisco County.

H. T. Love for respondent.

BALDWIN, J.—The statement for a new trial in this cause, if it could be regarded at all, is so imperfect that it is impossible for us to know whether the ruling of the court below was right or not; and all presumptions are in favor of its correctness.

Indeed, it is impossible from the account the record gives us of the case to ascertain what the merits of it are.

We must therefore affirm the judgment.

I concur: Cope, J.

OPINION ON REHEARING.

December 28, 1859.

BALDWIN, J.—We have looked again into the record. The statement is so imperfect that we can arrive at no intelligent opinion as to the real facts. For example, at page 12 of the transcript the paper says: "Add Col. James' testimony"; nothing is added. What Col. James' testimony was we do not know. It may have had a controlling influence on the judgment of the court. Other defects might be added, but this is enough.

The rehearing is refused.

I concur: Cope, J.

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ROBERT INCHES, Appellant, v. HENRY VAN VALKENBURGH, Respondent.

No. 2251; November 29, 1859.

**Appeal—Report of Referee—When not Disturbed.**—A judgment upon a report of a referee, where no motion has been made to set it aside or for a new trial, will not be reviewed on appeal.

APPEAL from Fourth Judicial District. San Francisco County.

A. T. Wilson for appellant; H. S. Love for respondent.

BALDWIN, J.—In this case judgment was entered for the defendant on the report of a referee. No motion was made for a new trial, or to set aside the report of the referee. An appeal is taken from the judgment so entered on the report of the referee; but it has been expressly held that this court will not review such a judgment under the circumstances: Porter v. Barling, 2 Cal. 72.

Judgment affirmed.

I concur: Cope, J.

HENRY S. HOWARD, Appellant, v. J. B. LOW, Respondent.

No. 2409; November 30, 1859.

**Animals—Liability for Pasturage.—Where One Contracts to** have cattle pastured, the fact that he does not own all of them does not affect his liability to pay for the pasturage.

**Appeal.—It is not Necessary to Give Damages** because an appeal was taken without reason, when the appellant has only stayed his own judgment drawing ten per cent interest.

APPEAL from Tenth Judicial District, Sutter County.

Wilkins for appellant; Watkins & Keyser for respondent.

BALDWIN, J.—Suit was brought on a note for three hundred dollars, given for a tract of land, and judgment prayed for the note, as also for a sale of the land by virtue of the vendor's lien to pay the note. A jury was waived and the case tried by the court; but whether waived or not, as this seems to have been an equity case, no jury was necessary. The defendant set up an offset for seven hundred and fifty dollars, on open account for pasturing cattle, and prayed for a counter-judgment for the excess after satisfying the note. The court found the account due in part, and gave judgment accordingly for the plaintiff for the amount of the note, less one hundred and twenty dollars allowed as an offset. The plaintiff appeals from this judgment.

We see no just ground of appeal. The evidence seems to support the finding. There appears in the statement proof of this contract and of the value of the pasturage and number of cattle pastured. The fact that some of the cattle belonged to another person than plaintiff or jointly to plaintiff and another is no objection to the offset against the plaintiff, who made the contract to pasture them. We see no reason for appealing this case, but as the plaintiff has only stayed his own judgment drawing ten per cent interest per annum, we do not think it necessary to give any damages.

Judgment affirmed.

I concur: Cope, J.

JOHN GREGORY, Appellant, v. THOMAS J. HAYNES, Respondent.

No. 2511; December 10, 1859.

**Forcible Entry and Detainer—Findings—Appeal.**—Where, in a case of forcible entry and unlawful detainer, the court below has made findings which the evidence is sufficient to support, the findings will not be disturbed.

APPEAL from San Francisco County.

John Gregory for appellant; Daniel Rogers for respondent.

COPE, J.—This is an action under the statute in relation to forcible entries and detainers. It was tried by the court without a jury, and the findings show that the defendant was in possession of the premises at the date of the alleged forcible entry. It is contended that the findings in this respect are not sustained by the evidence, but we think that we should, upon the same facts, have arrived at the same conclusion. It is not our province, however, to decide in such cases upon the mere weight of the evidence, but to determine whether there is sufficient evidence to support the findings. The appeal is without merit, and the judgment must be affirmed.

Ordered accordingly.

I concur: Baldwin, J.

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ALLEN T. WILLSON, Appellant, v. ANDERSON CUMMINGS, Respondent.

No. 2414; December 13, 1859.

**Reference.—When, Under an Appropriate Stipulation,** an order of reference is made with authority to the referee to try the issues and report a judgment, and the referee thereupon overrules a demurrer to the complaint and promptly reports a judgment for the plaintiff which the clerk of court enters on the same day, and subsequently execution is issued, it is proper for the court, upon

motion and affidavits and the papers in the case, to set aside the judgment and execution and to grant to the defendant, he having moved with due diligence under the stipulation, leave to file his answer to the complaint.

APPEAL from Twelfth Judicial District, San Francisco County.

A. T. Willson for appellant; H. K. W. Clarke for respondent.

COPE. J.—This case was referred to a referee to try the issues and report a judgment. The order of reference was based upon a written stipulation of the parties, in which it was provided that either party dissatisfied with the report of the referee could except to the decision within ten days, and in case of any exceptions being taken, that the referee should report the evidence and proceedings before him within twenty days. When the order was made no answer had been filed and the only issues were those presented by a demurrer to the complaint. The referee decided that the complaint was sufficient, and reported a final judgment in favor of the plaintiff. This report was filed on the 18th of March, 1858, and on the same day the clerk proceeded to enter a judgment for the plaintiff in accordance with the prayer of the complaint, upon which judgment an execution was subsequently issued. On the 27th of March, 1858, the defendant moved, upon affidavits and the papers in the case, to set aside this execution and judgment and for leave to answer, which motion was granted by the court.

The court undoubtedly possessed the power to grant the relief sought by this motion, and under the circumstances we think the power was properly exercised. It was certainly not the intention of the parties that the case should be finally determined upon the complaint and demurrer. If the demurrer had been sustained, the complaint could easily have been amended so as to present a good cause of action, and the affidavits upon which this motion was based disclose prima facie a valid defense. But the intention of the parties is sufficiently shown in the stipulation itself. If it had been understood that issues of law only were to be tried, it

is not probable that a provision would have been inserted for reporting the evidence.

The order of the court below setting aside the execution and judgment and granting the defendant leave to answer is affirmed.

We concur: Baldwin, J.; Field, C. J.

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A. WITCHER et al., Appellants, v. WM. JANSEN et al., Respondents.

No. 2783; April 6, 1860.

**Payment—Recovering Back—Irregular Judgment.**—Money paid under protest to a sheriff upon an execution cannot be recovered back if the judgment on which the execution rested was irregular merely and not void.

APPEAL from Eleventh Judicial District, Placer County.

Mumford, Winans & Hyer for appellants; Mills & Rowell for respondents.

COPE, J.—This is an action to recover money paid to the sheriff of Placer county upon an execution issued from the county court of that county. The money was paid under protest, and the ground of recovery relied upon by the plaintiffs is that the execution was issued upon a void judgment. The complaint shows that there was a good cause of action within the jurisdiction of the court, and there is nothing in the record entitling the plaintiffs to assail the judgment collaterally. It may have been irregular, but it is not shown to have been void.

The judgment is affirmed.

I concur: Baldwin, J.

JOHN L. GREEN, Respondent, v. CHARLES DOANE, Appellant.

No. 2741; May 4, 1860.

**New Trial.—A Failure to Prosecute a Motion for a New Trial** is to be regarded as an abandonment of it, and an order, made upon application of the opposing party in such a case, refusing the new trial, is to be upheld.

APPEAL from Twelfth Judicial District, San Francisco County.

Brooks for respondent; Love & Wattson for appellant.

FIELD, C. J.—The appeal in this case is from the order refusing a new trial and from the final judgment. The motion for the new trial was refused on the application of the plaintiff, no one appearing on behalf of the defendant in its support. The failure thus to prosecute was a virtual abandonment of the motion, and the order made thereon was not, upon the authority of Mahoney v. Wilson [15 Cal. 42], decided at the January term, and of Frank v. Doane [15 Cal. 302], decided at the present term, a subject of review in this court. Upon the appeal from the final judgment there is no statement, and the case before us rests, therefore, upon the judgment-roll, and as this discloses no error, an affirmance of the judgment must follow; and such affirmance is ordered.

We concur: Baldwin, J.; Cope, J.

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M. CONNELLY, Appellant, v. POLLARD, EDDY et al., Respondents.

No. 2448; May 11, 1860.

**Contract.—After Failure to Perform What He has Bound Himself** to do under an agreement, a party cannot compel performance by the other parties of their part.

APPEAL from Fourteenth Judicial District, Nevada County.

This was a suit to enforce the delivery of a deed by Pollard and others composing the Shady Creek Water Company, and

for an accounting as to the proceeds of a certain interest in the Irish or Double Tunnel Company. The facts were these: On the 17th of June, 1856, Pollard, the agent of the water company, entered into an agreement with the plaintiff and one Thomas Fant. At that time the principals of Pollard owned an undivided one-half interest in certain mining claims known as above indicated, and Fant the other, and the agreement reciting that on that day Fant had conveyed his interest to his co-owner, so that the latter now had the whole, stipulated that the whole should be duly conveyed to Fant and the plaintiff on the payment of a sum named by them to the other within a year from the date of the instrument. The understanding was that Fant and Connelly were to remain at the diggings and work the purchase money out of them and these persons went into possession and started to work as designed, but the claims not paying anything over expenses the plaintiff abandoned them about March, 1857, and went to Nevada to live, declaring the claims would not pay and that he would have nothing more to do with them. At this time nothing had been paid by Fant and the plaintiff, or either of them, of the amount called for in the agreement.

After the plaintiff left the diggings Fant continued there, working them, and himself alone paid the money called for, most of it after June 20, 1857. There was no evidence of collusion between Fant and Pollard, or his principals, and it did not appear that the plaintiff ever had demanded a conveyance from Pollard, or the Shady Creek Company or an accounting from them or either of them, or from Fant. The court below made its findings virtually as above and gave judgment for the defendants.

F. D. Dunn for appellant; T. B. McFarland for respondents.

COPE, J.—The findings of the court are fully sustained by the evidence. The plaintiff is in no situation to call for an enforcement of his contract with the defendants. It is clear that he has failed to perform his part of the agreement, and there is no principle of equity upon which the defendants can be compelled to perform theirs.

The judgment is affirmed.

I concur: Field, C. J.

WILLIAM BOOTH, Appellant, v. WILLARD STONE, Respondent.

No. 2674; June 8, 1860.

**Ejectment.—A Complaint in Ejectment That Alleges prior possession by the plaintiff and ouster by the defendant is sufficient.**

APPEAL from Ninth Judicial District, Siskiyou County.

This was an action of ejectment, to recover possession of one hundred and sixty acres of land in Siskiyou county. The complaint set up that the plaintiff on the 23d of December, 1853, had entered upon, taken up and located the land, describing it, that it was government land, that on the day named record had been made in the office of the county recorder that the plaintiff went into possession at that time, inclosed, improved and cultivated the land for three years, and while he was in the legal, quiet and peaceable possession of it the defendant, on the 23d of December, 1856, by force and arms, broke and entered upon the premises, ejected the plaintiff and took the possession, and had retained the possession up to the bringing of the action and still retained it. Other allegations were that the plaintiff was the legal owner still, and lawfully entitled to the possession, of the premises, that he had frequently demanded them of the defendant, only to be refused, that he had cautioned the defendant and forbidden him occupying, cultivating or improving the land, that the defendant, ever since the 23d of December, 1856, had had the use, occupation, rents and profits of the land, which belonged to the plaintiff, and that the plaintiff had never sold, abandoned or in any manner disposed of his interest in, or right of possession to, the premises. The prayer was for the possession and for a named sum for use and occupation and rents and profits.

The defendant demurred generally and also on specific grounds, to wit: that the complaint did not show seisin in the plaintiff, that it contained no allegation that the plaintiff had received the esplees of the premises, none that he was at any time in the possession, and finally that it showed the plaintiff to have no interest in the premises, but rather that they belonged to the government.

The court sustained the demurrer and, the plaintiff refusing to amend, gave judgment for the defendant, from which judgment the plaintiff appealed.

Fletcher for appellant; Rosborough & Berry for respondent.

COPE, J.—The complaint contains all the allegations necessary to maintain the action. It alleges a prior possession in the plaintiff and an entry and ouster by the defendant.

The demurrer was improperly sustained.

Judgment reversed, and cause remanded for further proceedings.

We concur: Baldwin, J.; Field, C. J.

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P. A. CRAVENS, Respondent, v. S. L. DEWEY, Appellant.

No. 2683; June 30, 1860.

**Appeal—When Without Merit.—An Appeal by an Unsuccessful Defendant whose answer put in issue no averment of the complaint except the general one of payment, and whose points urged to impeach the judgment are either frivolous or not sustained by the record, should result in affirmance if it appears that the trial court put the case fairly before the jury and the jury gave a just verdict.**

APPEAL from Fifteenth Judicial District, Plumas County.

Handley & Hayden for respondent; Filkins, Cox and Barnett for appellant.

BALDWIN, J.—It would be a useless task to go into the examination in detail of the numerous points made in this case by the appellants. Some of these points are frivolous and the others not sustained by the record or not good in law. The court put the case fairly to the jury, upon the simple proposition involved in the controversy. The answer of the defendant is so equivocal as to put no material averment of the complaint in issue, except, probably, the payment of the whole sum due on the contract. Justice seems to have

been done by the verdict, and no error committed to the prejudice of the appellant.

The judgment is affirmed.

I concur: Cope, J.

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NICHOLAS DABOVICH, Respondent, v. JOSEPH EMERIC, Appellant.

No. 2627; July 3, 1860.

**Appeal—Reappearance of Case—Reaffirmance.—A Judgment in Accordance with the principles of a past decision on appeal of the same case is to be affirmed.**

APPEAL from Fourth Judicial District, San Francisco County

Whitcomb, Pringle & Fulton for respondent; E. W. F. Sloan for appellant.

See Dabovich v. Emeric, 12 Cal. 171.

BALDWIN, J.—This case has been tried three times and verdicts had for plaintiff. It seems to have been tried the last time in accordance with the principles of the decision here when the case was last in this court. We see no such error as to induce us to interfere with the judgment.

The point as to the costs is not well taken. The motion to retax should have been made below within the time prescribed.

The judgment is affirmed.

I concur: Cope, J.

MARY VALENTINE, Respondent, v. CHARLES DOANE, Appellant.

No. 2522; July 5, 1860.

**Reference—Appeal.—Where a Referee,** who has had the witnesses before him and heard them testify, files his report, and the district court refuses to set this aside, such refusal is to be upheld.

APPEAL from Fourth Judicial District, San Francisco County.

I. Satterlee for respondent; Shafter & Heydenfeldt and W. W. Chipman for appellant.

BALDWIN, J.—This record involves merely a question of fact as to the possession and ownership of certain vegetables, as to both of which facts there was testimony direct and inferential on both sides. The referee made his report after hearing and seeing the witnesses, the most important of whom were Foueguera, and the district court refused to set aside the verdict.

It is unnecessary to appeal to us in such cases, as we have often held.

The judgment is affirmed.

I concur: Cope, J.

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WM. B. DICK, Respondent, v. JOSIAH J. LE COUNT, Appellant.

No. 2657; July 5, 1860.

**Reference—Appeal.—A Judgment upon the Report** of a referee, where the evidence was sufficient to support the findings in such report, is to be affirmed.

APPEAL from Twelfth Judicial District, San Francisco County.

J. B. Townsend for respondent; Shafter & Heydenfeldt, for appellant.

BALDWIN, J.—This suit is an account for goods. The defendant sets up the statute of limitations, and the question of its application to the items charged before September 3, 1856, depends upon the question of fact, upon which the case has been argued, as to other dealings between these parties after that date.

We have examined carefully the proofs, and have come to the conclusion that there was evidence tending to show that Le Count bought goods of plaintiff, as charged in the account, subsequently to the period named.

The positive testimony of Graff certainly is not a little suspicious in some of its circumstances, and the other testimony as to the sending of the goods bought by Graff to Le Count, the charges in the books to Le Count, the suspicious appearance of the invoices produced by Graff, to say nothing of the more direct testimony of some of the witnesses—Wilson, for example—tends to establish plaintiff's case.

We are unwilling, especially in favor of such a defense as is here set up, to disturb the finding of the referee and the order of the district judge refusing to set it aside.

The judgment is affirmed.

I concur: Cope, J.

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## PEOPLE ex rel. JOHN E. BUNNELL v. J. S. HAGER.

No. 2973; November 14, 1860.

**Taxation.—Where a Default Judgment is given for, among other things, taxes levied without authority, the supreme court will remand the case.**

**APPEAL from Fourth Judicial District, San Francisco County.**

BALDWIN, J.—The judgment by default in this case is erroneous. The judgment is for, among other things, contingent tax, and, for the year 1859, for building tax levied by the board of supervisors. We have been referred to no authority for levying these items, and yet judgment is given

for them. The judgment so far is wholly unauthorized, the complaint showing no cause of action as to those items. As judgment was rendered in the absence of defendants, we think it best to remand the case that he may set up his defense, if he has any, except as above indicated.

So ordered.

We concur: Field, C. J.; Cope, J.

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## GARFIELD v. KNIGHTS FERRY AND TABLE MOUNTAIN WATER CO. NO. 1.

March 1, 1861.

**Special Verdict.—In Regard to the Sufficiency of a Special Verdict,** when the question submitted is whether one in employing another acted for himself or as an agent, the rule is that enough must be found, when the verdict is relied on as the basis of a judgment, to show in and of itself a legal conclusion of liability.

BALDWIN, J.—The finding in this case is in the nature of a special verdict. It is that the work was done at the instance of Kappelman & Co., who were the agents of the defendant, the defendant being a corporation. It was claimed by the defendant that though Kappelman & Co. were the agents, they were also contractors, and that they employed the plaintiff in this last capacity. There is no necessary inconsistency between a man being an agent and his contracting in an individual capacity, and the very question here was, as to what capacity Kappelman & Co. acted in making this contract. The rule is that enough must be found by a special verdict or finding, when that is relied on as the basis of a judgment, to show in and of itself a legal conclusion of liability. This was not done here. We must, therefore, reverse the judgment, that the issue may be directly and explicitly found.

We concur: Field, C. J.; Cope, J.

## PEOPLE v. BUCK.

No. 3007; April 19, 1861.

**Appeal.—Undue Delay in Filing Assignments of Error After Sending up the record calls for a dismissal of the appeal for lack of prosecution.**

FIELD, C. J.—The record in this case, has been in this court since the 12th of December, and yet no assignments of error have been filed on behalf of the appellant. The appeal must therefore be dismissed for want of prosecution, and the judgment affirmed, and it is so ordered.

I concur: Cope, J.

## THURN v. SWAIN et al.

May 3, 1861.

**New Trial.—An Order Granting a New Trial will be Sustained on Appeal in all cases where an abuse of discretion by the trial court is not shown.**

COPE, J.—This is an appeal from an order granting a new trial. We always interfere in such cases with great reluctance, and never exercise our revisory authority except to correct an abuse of discretion. We think the purposes of justice do not require our interposition in this cause, and we are by no means clear that great injustice might not be done by a contrary course.

The order is affirmed.

We concur: Field, C. J.; Baldwin, J.

SARAH M. REED, Respondent, v. WILLIAM S. CLARK, Appellant.

No. 2579; April 17, 1862.

**Breach of Promise to Marry.—Evidence to the Effect that after** an alleged promise by the defendant to marry the plaintiff the latter announced to several persons, in the defendant's absence, that she was engaged to him, is admissible to show that the promise had been accepted by the plaintiff, although not tending to prove the promise itself.

**Trial—Passing upon Admissibility of Evidence.**—It is not error for the court, in passing on the admissibility of evidence, to assume pro hac vice that a necessary preliminary fact had been established by prima facie proof.

**Breach of Promise to Marry—Pecuniary Condition of Defendant.**—In an action for damages for breach of promise to marry, it is not error for the court to charge the jury that in assessing the damages it is their province to take into consideration the defendant's pecuniary condition.

**Breach of Promise—Aggravation of Damages.**—In an action for breach of promise to marry, it is not error for the court to charge the jury that they may consider in aggravation of damages whether or not the defendant had come into court and wantonly attempted to show the plaintiff guilty of improper conduct with other men, of which she was innocent.

**Breach of Promise—New Trial, When Properly Denied.**—A motion by the defendant for a new trial based upon newly discovered evidence in a suit for breach of promise to marry is properly denied, if such evidence goes merely to the question of the plaintiff's chastity and at the trial the defendant has introduced much evidence on that question.

APPEAL from Fifteenth Judicial District, San Francisco County.

H. & C. McAllister and A. Campbell for respondent; Clarke & Carpenter for appellant.

See Reed v. Clark, 47 Cal. 194.

NILES, J.—Action for breach of promise of marriage. The defendant moved for a new trial upon several grounds.

1. Evidence was admitted at the trial showing that after

the date of the alleged promise, plaintiff announced to several persons, in the absence of the defendant, that she was engaged to marry the defendant. There was no error in the admission of this testimony. Conceding that an express promise of marriage had been made by the defendant, it was essential to show that the promise had been accepted by the plaintiff. Considering the peculiar nature of the contract sought to be established, the frequent and public announcement of the engagement by the plaintiff would be among the best evidences of her acceptance of the offer of the defendant. This testimony would not tend to prove the promise by defendant; but it is admissible to prove the equally essential fact—the assent of the plaintiff: Wetmore v. Mell, 1 Ohio St. 26, 59 Am. Dec. 607; Peppinger v. Low, 6 N. J. L. (1 Halst.) 384. This evidence was offered generally, and is excepted to as being irrelevant and immaterial. Since it was relevant to a material issue in the case it was properly admitted.

2. It is not error that the court in passing upon the admissibility of testimony should assume pro hac vice, that a necessary preliminary fact has been established by prima facie proof. It frequently happens that the court must consider what facts the proofs have tended to show, in order to determine what further facts may properly be shown. When a nonsuit is applied for, the court passes upon questions of evidence in the presence of the jury, but only for the purposes of the motion; but this is not considered as an instruction upon the facts. In this case I do not understand the court as asserting to the jury as a fact that a promise had been made; but merely that sufficient proof of that fact had appeared to authorize the admission of the testimony offered. Whatever impression may have been produced upon the minds of the jury by the expression of the court must have been removed by its subsequent instruction, that the jury should not be influenced "by an apparent expression of opinion as to the facts, made by the court."

3. The court did not err in its charge to the jury, that it was their province to "take into consideration, in the question of damages, the pecuniary condition of the defendant." His pecuniary ability to afford the plaintiff a comfortable support may very well have formed the chief inducement to the contract on her part. The deepest wound to her feelings may

have resulted from the loss of the affluence she had been led to expect: Sedgw. on Dam. 544; Kniffen v. McConnell, 30 N. Y. 289; James v. Briddington, 6 Car. & P. 589; Lawrence v. Cooke, 56 Me. 193, 96 Am. Dec. 443.

4. The court charged the jury that they had a right to consider, in aggravation or enhancement of damages, whether or not the defendant had wantonly come into court, and attempted to show the plaintiff guilty of improper conduct with other men, of which she was innocent. It is well settled that "where the defendant attempts to justify his breach of promise of marriage by stating upon the record, as the cause of his desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving it, this is a circumstance which ought to aggravate the damages": Southard v. Rexford, 6 Cow. (N. Y.) 260. It seems to be conceded by the defendant's counsel, that if the defendant had merely averred the unchastity or improper conduct of plaintiff in his answer, without the introduction of any proof to sustain such averments, the instruction would have been warranted, for the reason that the failure to offer proof to sustain the charge would have shown that it was not made in good faith. I cannot see how the defendant betters his position by wantonly attempting to sustain his averments by proof. The instruction was sufficiently guarded to prevent the jury from holding that evidence of unchastity, if offered in good faith, would aggravate the damages.

5. The alleged newly discovered evidence goes entirely to the point of the unchastity and improper conduct of the plaintiff. This was one of the questions in controversy at the trial, and upon which much evidence was introduced. The defendant now asks for a new trial, that he may multiply witnesses to acts upon the part of the plaintiff of the same general character as those proven at the former trial, and differing therefrom only in the times and manner of their commission. This evidence is merely cumulative, and is not good cause for a new trial: Waller v. Graves, 20 Conn. 310; Stoakes v. Monroe, 36 Cal. 388. Moreover, considering the character of the evidence proffered, I cannot say that the court might not have reasonably inferred that the verdict would have been the same, if the evidence had been in.

Several other points were made in the case, which I do not deem it necessary to discuss. I find no error requiring a reversal.

Judgment and order affirmed.

We concur: Wallace, C. J.; Rhodes, J.

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J. W. DENEY et al., Appellants, v. J. M. COREY et al., Respondents.*

No. 3491; December 22, 1862.

**Trial—Verdict Against Evidence.—A Verdict for Defendant,** who has offered no evidence, in an action in which the plaintiff has proved plainly a prima facie case, cannot be sustained.

APPEAL from Sixteenth Judicial District, Mono County.

L. Guint for appellants; W. P. George for respondents.

SHAFTER, J.—This is an action to recover damages for an alleged trespass upon a mining claim of the plaintiffs, described as situated on "Last Chance Hill and about one hundred feet north of the claim known as the Real Del Monte claim in Mono County, California."

It is alleged in the complaint that on the eleventh day of December, 1860, the claim in question was located by the plaintiffs or by those to whose right they have succeeded, pursuant to the mining laws of the district in which the claim is situated. That the notice claimed seven hundred feet each way, running northeasterly and southwesterly, from the point where the notice was exhibited. That while the plaintiffs were in possession, and on or about the 1st of April, 1861, the defendants entered upon the premises and committed the trespass complained of, etc., taking out and carrying away the gold and silver quartz from said claim.

Most of the leading allegations of the complaint are denied in the answer, and the defendants, by way of special defense, say that on or about the 7th of December, 1860, they or those

* A rehearing in this case was granted April 17, 1863.

under whom they claim, located the ground in question and remained in possession thereof until about the middle of said month, when their claim was duly recorded in the mining records of the district as follows:

"We, the undersigned, claim six claims, including one for discovery which belongs to M. W. Ridgley, on the Aetna Quartz Lode, commencing at this notice and running 600 feet each way in a North Easterly and South Westerly direction on the Lode, situated about 60 feet Easterly from the Edward Everett Lode.

"Located Dec. 15, 1860. Filed for Record Dec. 18, 1860.

"Recorded Dec. 19, 1860.

"J. M. BROWLY."

(Signatures of parties.)

It is further alleged that the defendants have been in peaceable possession, etc., and that they alone have the right to enter upon the claim and take out rock, etc.

The facts of the defendants' alleged title are denied in the replication. The trial was by jury, and under the instruction of the court, special issues were drawn up and submitted to them. The issues, together with the findings of the jury thereon, were as follows: 1st. Is the vein in controversy the one located by the plaintiffs' grantors as the "Almaden Claim"?

Answer. No.

2d. Is the vein in controversy the one located by defendants as the "Aetna Claim"?

Answer. Yes.

3d. Is the vein in controversy the one referred to in the plaintiffs' recorded notice as the "Aetna Claim"?

Answer. Yes.

4th. Are there two distinct claims, or is the vein in controversy the only one, and claimed by both parties?

Answer. There is but one vein, and that is claimed by both parties.

5th. Did the plaintiffs comply with the rules and usages established and enforced, by placing stakes or other landmarks on the claim and posting the required notices?

Answer. The plaintiffs did comply with the rules established and in force.

did it become manifest to the jury that it was within the limits of the older claim of the defendants also?

The existence of a prior and better claim to the plaintiffs' location was alleged in the answer, and the averment was denied in the replication. The burden of proof was therefore upon the defendants.

As already stated, the defendants introduced no evidence, and if the finding of the jury had any basis, it must be found in the evidence of the plaintiffs.

In the record of the plaintiffs' claim filed on the 19th of December, 1860, their location is described as "situated about fifty feet southeasterly from the Aetna lode on Real del Monte Hill." This passage in the record tends to prove, first, the prior existence of the "Aetna Claim," and second, that the two claims, instead of being identical in space, were to that intent different and diverse. Further, there was no evidence showing the dimensions of the defendants' claim on the vein. For aught the jury could know to the contrary, the Aetna claim was limited to a hand breadth. But however that may be, the descriptive passages taken from the record of the plaintiffs' claim, the map, and the testimony by parol, all tended to prove directly that the defendants' older claim was not to any extent identical with the plaintiffs' in position.

The counsel of the plaintiffs insist that on the fifth finding of the jury the court below erred in not ordering judgment for the plaintiffs.

The fifth finding disassociated from the other findings, and taken in connection with the admissions in the pleadings, might, perhaps, warrant a judgment for the plaintiffs. But the court below, in considering of its judgment, was bound to notice and accept all the findings, and four of them not being consistent with a judgment for the plaintiffs, the motion for such judgment was properly overruled.

Judgment reversed and new trial granted.

We concur: Sanderson, C. J.; Sawyer, J.; Currey, J.

section thereof—were confined entirely to evidence introduced by the plaintiffs, for the record shows that the defendants introduced none.

We have examined the evidence, as related to the findings of the jury in response to the first four questions submitted to them. There is no conflict in the evidence, and the facts found are directly opposite to those which the evidence, and all of the evidence, tended to prove.

The plaintiffs put a map in evidence made by the county surveyor, and proved its correctness by a witness intimately acquainted with the localities.

There are two distinct veins or lodes represented upon the map, running in a northeasterly and southwesterly direction and parallel to each other, with a space between them of about thirty-four feet. The eastern vein is designated as the "Almaden Quartz Lode," and the point on the lode where the plaintiffs' notice was stuck up is indicated. The point also is represented at which the defendants tapped the Almaden vein, and that point is within the limits of the plaintiffs' claim on the vein, as those limits are established by the records of the district and the parol proof accompanying them. The western vein is described on the map as a "Quartz Lode." There is a tree represented as growing on the line of the lode, named on the map as the "Aetna notice tree."

The map establishes, first, the plaintiffs' theory of two lodes, and second, that the Aetna claim was located upon the western, and the plaintiffs' upon the eastern, lode. In the face of this testimony however, and it was all the testimony upon the subject, the jury found that there was but one vein.

But the discussion may be carried a step farther. Waiving the objection to this finding, and assuming that there was but one vein—and that the vein described in the complaint; and further assuming that both locations were on that vein, as the plaintiffs' location incontestibly was; and further assuming that the defendants' claim on that vein, somewhere "in the vicinity" of the plaintiffs', was older than the plaintiffs' by some three days—how were the jury justified in finding, as they did in effect, that the older claim of the defendants included that section of the vein from which the mineral was abstracted? On the proofs and all of the proofs, that section was manifestly within the limits of the plaintiffs' claim—how

show that the defendant was entitled to a judgment, it is unnecessary to send the case back for a new trial.

The judgment is therefore reversed, and judgment is rendered for the defendant, that he have and recover his costs herein expended from the plaintiff, and that the plaintiff take nothing by his action.

I concur: Norton, J.

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## B. S. BROOKS, Respondent, v. L. TICHNER et al., Appellants.*

No. 3899; December 29, 1863.

**Mortgage—Foreclosure—Parties.—The Owner of the Legal Title** is a necessary party to a suit for the foreclosure of a mortgage.

**Mortgage.—The Mortgage is Simply a Lien, a Mere Incident** to the debt it is intended to secure; and the interest of the mortgagor, under former systems an equitable interest denominated an equity of redemption, is under our system regarded as the legal title in every sense and for every purpose.

**Mortgage.—The Object of a Foreclosure Suit,** so far as concerns the land, is to subject that to sale for the satisfaction of the debt and to bar the parties, brought before the court, from all right to redeem it, except as allowed by statute, from the sale under the decree.

**Mortgage.—Strict Foreclosure is not Known to Our Law,** but under our system the court decrees that the mortgagor's interest in the land, held by him when executing the mortgage or acquired by him subsequently, be sold in satisfaction of the debt.

**Mortgage Foreclosure.—The Only Object or Effect of the Statute** relative to foreclosures of mortgage is to afford a protection to a subsequent purchaser for a valuable consideration and without notice.

**Lis Pendens.—The Statute has not Declared the Effect** of a notice of lis pendens, but merely says that "from the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby."

**Lis Pendens—Not Retroactive.**—The notice of lis pendens is not made to reach back, by relation, from the time of its being filed, so that a person who acquired an interest in the property subjected

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* A rehearing in this case was granted February 4, 1864, and a rehearing was again granted March 6, 1865. An order dismissing the cause was entered August 15, 1865, and a remittitur issued August 12, 1867.

to litigation before the suit was begun shall be affected by such filing with notice of the suit.

**Mortgage Foreclosure—Unknown Owner.**—If a plaintiff in foreclosure is mistaken as to or ignorant of the actual ownership of the property when bringing his suit, his course is, upon learning who is the true owner, to bring the latter before the court during the proceedings, or else after the proceedings have his interest subjected to the decree.

**Deed—Unrecorded Conveyance by Mortgagor.**—There is no rule, either by statute or in equity, whereby an unrecorded deed, made by a mortgagor after executing the mortgage and before suit to foreclose it is begun, shall be treated as made pendente lite.

**Execution—Sheriff's Certificate.—No Title Passes by the Sheriff's Certificate**; it requires the deed to vest title in a purchaser at a sheriff's sale. The purpose of having the certificate filed is, that the judgment debtor and the redemptioners shall have information necessary for them to have in coming in to redeem.

**Mortgage.—The Grantee of an Unrecorded Deed to the Mortgaged Property**, made after the execution of the mortgage, is not, after the mortgage has been foreclosed, estopped to claim such property as against the purchaser at the foreclosure sale by his having been aware of the proceedings while they were going on, and even though he acted as attorney for the defendants in those proceedings, the mortgagee and such purchaser not knowing of his interest.

APPEAL from Twelfth Judicial District, San Francisco County.

B. S. Brooks in pro. per.; F. F. Pringle and H. J. Labatt for appellants.

RHODES, J.—This is an action of ejectment. The plaintiff had judgment and the defendant appealed to the late supreme court, who reversed the judgment and ordered judgment on the findings for the defendants, and afterward this court granted a rehearing. It will be necessary to repeat a few of the facts found by the court below, to give a correct understanding of our views of the law applicable to the case.

On the eighteenth day of September, 1852, Lowell and wife, who resided upon and were in possession of a tract of which the premises in controversy form a part, mortgaged the same to Wingate, to secure the payment of fifteen hundred dollars and the interest. Lowell and wife, in 1853, conveyed the premises to Carter, who in the same year conveyed the un-

divided half to Lawrence, and that half by mesne conveyance vested in the plaintiff, the deed to him being dated May 30, 1855. Carter conveyed the remaining half to the plaintiff, by deed dated September 11, 1855. All the deeds except the two to the plaintiff were duly recorded, and those two were recorded January 29, 1859.

In 1856 Wingate commenced an action to foreclose his mortgage against the mortgagors (Lowell and wife), the two immediate grantors of the plaintiff and the mortgagee of one of them; and on the seventh day of February, 1857, he filed in the recorder's office a notice of lis pendens, and a decree of foreclosure and sale was rendered against all of the defendants by default October 3, 1858. The premises were sold by the sheriff on the nineteenth day of November, 1858, and the certificate of sale was duly filed, and on the 28th of May, 1859, the sheriff executed a deed to the purchaser. The purchaser entered into possession of the premises after the purchase was made. The defendants claim through the sheriff's deed. The court found that the plaintiff at the time of the foreclosure suit was, and still is, an attorney and counselor at law, practicing in the courts of this state; that during the pendency of the foreclosure suit he, as the attorney for one of the defendants—Partridge, who was one of his grantors—applied to Wingate's attorney for an extension of time to answer; that at that time he told Wingate's attorney that he (Brooks) claimed an interest in said premises under various titles, by prior possession and under a Mexican grant, but did not inform him that he claimed any interest under Lowell or subject to the mortgage, but he intended to leave, and did leave, on the mind of Wingate's attorney the belief that he claimed by title adverse to that which was sought to be foreclosed; and the court also found that neither Wingate nor his attorney knew, during the pendency of the foreclosure suit, that Brooks claimed any interest in the premises which was subject to the mortgage.

Several questions have been ably argued by the respective counsel, and particularly the one arising upon the construction of the Van Ness ordinance, but we think it unnecessary to pass upon that or many of the points raised. If the proposition of the appellants can be maintained that the title that passed by means of the Van Ness ordinance and the con-

firmatory act of the legislature vested, not in those in possession at the date of the introduction of the ordinance, but in Lowell, as the first possessor, and that it vested in him in such a manner that it fed the several conveyances and mortgages from and under him, so that the several mortgagees and purchasers will be deemed to have held the same right, title and interest in the premises that they would have had if Lowell, at the time of the execution of his mortgage to Wingate, had held that title, it still will not materially affect or qualify the view that we shall take of the case. For, if the appellants' construction of the ordinance is correct, we must first determine the rights of the parties growing out of the proceedings in the foreclosure and the transactions connected therewith, because the several parties would bear the same relation to each other and to the premises, with that title annexed, as they would if their rights and interest depended solely upon the prior possession of Lowell.

There can be no doubt that the owner of the legal title is a necessary party to a suit for the foreclosure of a mortgage. No rule of equity is more generally recognized than this, and so well settled is it, both upon principle and authority, that cases are seldom cited in its support. The importance as well as the necessity of the rule becomes the more manifest when it is considered that under our laws the mortgage is simply a lien—a mere incident to the debt it is intended to secure—and that the interest held by the mortgagor, which under former systems was regarded as but an equitable interest, denominated the equity of redemption, is under our system regarded as the legal title in every sense and for every purpose. The object of the suit to foreclose the mortgage, so far as the land is concerned, is to subject the land to sale for the satisfaction of the debt, and to bar the parties brought before the court of all right of redemption of the land from the sale under the decree except that allowed by the statute. No such proceeding is known to our law as a strict foreclosure, in which a mere equity of the mortgagor is cut off because of his breach of the condition of the mortgage; but under our system the court decrees that the estate in the land held by the mortgagor at the time of the execution of the mortgage, or by him subsequently acquired, be sold in satisfaction of the debt. In order that the decree of

sale may be effectual to bind such estate, the person owning it must be made a party to the suit.

The findings clearly show, and no question is made of the fact, that at the commencement of the foreclosure suit the respondent was the owner of the legal title. Under the general rule we have stated, he was a necessary party to the action, and not having been made a party, he was not bound by the decree.

But it is said by the appellants that a lis pendens was filed, and that as the respondent had not then recorded his deeds and the mortgagee had no actual knowledge of their existence, the respondent was not a necessary party to the suit—that such a case is an exception to the general rule. This position depends for its support upon the nature and effect of the notice of lis pendens. The grantee was never required by the common law or the statute of this state to record his conveyance for the purpose of passing to himself the title of his grantor. The title passed upon the delivery of the deed, but the statute has imposed a certain penalty for the failure of the grantee to record his deed, and that penalty is that the unrecorded deed shall be void as against a subsequent purchaser in good faith and for a valuable consideration where his own conveyance shall be first duly recorded. No other penalty is annexed by the statute to the failure to record the deed, and the failure to record the deed does not leave in the hands of the grantor or in any person holding any right, title or interest in the land prior to that passing to the grantee by his deed any other or greater power over or right in the land than he would have if the deed was recorded. The only object or effect of the statute is to afford a protection to a subsequent purchaser for a valuable consideration and without notice.

The statute has not declared the effect of the notice of lis pendens. It merely says that "from the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby." The effect of the notice must be ascertained by a resort to the rules of equity, subject to the limitation of the statute, as to the time when its operation shall begin. It is said by Story that "a purchase made of property actually in litigation pendente lite for a valuable consideration,

and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree of the suit": 1 Story's Equity Jurisprudence, sec. 405. See, also, Willard's Equity Jurisprudence, 251; Bishop of Winchester v. Paine, 11 Ves. 194; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 576; Cook v. Mancius, 5 Johns. Ch. (N. Y.) 95. The notice is confined by the terms of the rule to a purchase subsequent to the institution of the suit: See Curtis v. Sutter, 15 Cal. 259–263; Gregory v. Haynes, 13 Cal. 591–594; Richardson v. White, 18 Cal. 102–107. It is nowhere said in the treatises upon equity, and it certainly is not declared by the statute, that the person who acquired an interest in the property which is the subject of litigation before the commencement of the action shall, if the plaintiff had neither actual nor constructive notice thereof, be deemed a subsequent purchaser and become subject to the consequences of the notice of the lis pendens. In other words, the notice is not made, by relation, to reach back of the time of its filing to a period anterior to the commencement of the suit. It follows, therefore, that the interest acquired in the premises by the respondent anterior to the commencement of the foreclosure suit was not changed or in any manner affected by the notice of lis pendens or the proceedings or decree in that action.

The respondent urges with great force the consideration that if the person holding the legal title, of which the mortgagee has no notice, actual or constructive, is a necessary party, and if in such case his title cannot be reached or devested until the mortgagee has notice of his title, then it is in the power of the mortgagor and his assigns, by successive unrecorded conveyances, to constantly baffle the mortgagee and prevent indefinitely a foreclosure. That liability may exist, and still as a remedy for the impending injury the respondents may not be entitled, as the law now stands, to a decree directly affecting the interest of a person not brought before the court. Previous to the statutes of registration of deeds the mortgagee was under the necessity of bringing in the holder of the equity of redemption as a defendant in the suit for a strict foreclosure, and the mortgagor in bringing his bill to redeem was required to make the holder of

the mortgage a defendant, otherwise the proceedings in either case would fail of effect. The plaintiff was obliged to make the proper parties defendants to the action, and if at the commencement of the action he was mistaken or ignorant as to the person then holding the title or equity that was to be passed upon by the court, he could, upon discovering the true owner, bring him before the court during the proceedings, or could subsequently subject his interest to the decree. The liability to the inconvenience and delays arising from the ignorance of the plaintiff, as to the person holding the legal or equitable title, existed under the former practice as fully as under the present, in case the purchaser from the mortgagor neglects to record his deed. There may be many reasons addressing themselves to the legislature, suggesting the propriety of enacting that an unrecorded deed made by the mortgagor prior to the commencement of proceedings to foreclose the mortgage shall, under certain circumstances, be treated as made pendente lite, but such is not now the rule of the statute or of equity, and we are without authority to make such a rule. In Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540, and Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561, the rule is stated, without qualification or exception, that the holder of the legal title is a necessary party to the suit to foreclose the mortgage.

It is insisted that the sheriff duly filed in the recorder's office the certificate of sale under the decree of foreclosure before the respondent's deeds were recorded, and that thereby the purchaser became such purchaser as is mentioned in section 26 of the act concerning conveyances, and is therefore entitled to the protection afforded by that section. The certificate is not a conveyance; no title passes by it. The deed is requisite to complete the series of acts which, taken together, devest the title of the defendants to the foreclosure suit and vest it in the purchaser: Catlin v. Jackson, 8 Johns. (N. Y.) 520; Farmers' Bank v. Merchant, 13 How. Pr. (N. Y.) 10; Vaughn v. Ely, 4 Barb. (N. Y.) 159; Smith v. Colvin, 17 Barb. (N. Y.) 157; Jackson v. Chamberlain, 8 Wend. (N. Y.) 620; Jackson v. Young, 5 Cow. (N. Y.) 269, 15 Am. Dec. 473.

The statute has not declared what shall be the effect of filing the certificate of sale. The statute of New York is quite

similar to that of this state, and it is said in Jackson v. Young, 5 Cow. 269, 15 Am. Dec. 473, that the statute providing for the filing of the certificate of sale is merely directory. The design in requiring the certificate of sale to be filed doubtless was to give the judgment debtor and the redemptioners the necessary information to enable them to effect a redemption. It appears very clearly from the reasoning of the court in Jackson v. Chamberlain—in which it is held that a purchaser at a sheriff's sale, who recorded his deed before notice of an unrecorded deed executed before the judgment—that the title of the judgment debtor passes upon the sheriff's deed executed in pursuance of the sale.

The point that is most strenuously urged by the appellant in connection with the foreclosure proceedings is that the respondent, when he had notice of the suit to foreclose the mortgage, not only did not disclose his title to the mortgagee, but studiously concealed it and induced him to believe that he (the respondent) claimed under a title adverse to that under which the mortgagee claimed; that such acts and representations and suppression of the truth in regard to his title amounted to a fraud upon the mortgagee.

There can be little doubt as to what was the duty, morally, of a person occupying the position the respondent filled at that time; and it may be admitted, for the purposes of this case, that legally he was under obligation to disclose the true state of his title. The alleged fraud in failing to disclose his title and in concealing it and neglecting to record his deed, it may be admitted, was calculated to and did mislead and injure the mortgagee, by preventing him from procuring a decree of foreclosure that would have bound the respondent's title, and its result, it may also be admitted, was to injure the purchaser at the sale, there being nothing of record then that indicated that the appellant claimed any interest in the premises under the Lowell title. It may be further conceded that the evidence shows that the mortgagee and purchaser, in ignorance of the true state of facts, relied and acted upon the declarations and acts of the respondent, and that they would be injured if he was now permitted to deny that the truth was as he induced them to believe. The respondent would in that event be cut off from the power of retraction and estopped from proving the truth as to his title. Those

acts and declarations amount to an estoppel in pais against the respondent, and constitute what is denominated an equitable estoppel. They do not devest him, however, of the legal title, for that he held previous to the foreclosure suit, and after the decree and sale, and he could by his own act pass the legal title in only one mode, to wit, a conveyance; but those matters constituting the estoppel in pais subjected the equitable title to the foreclosure proceedings, and transferred it to the purchaser at the sale under the decree. A court of equity, upon a proper case being made, will take hold of those facts which create and pass the equitable title, and decree that the legal title shall accompany the equitable title. The court will order the respondent to do that which he ought to have done if the truth had been as he induced the mortgagee and purchaser to believe it to be. A court of law is incompetent to administer relief in such case. The action of ejectment is founded on the legal title to the possession, and not upon the equitable title, and if the defendant wishes to rely upon an equitable title for his defense, he must set it up in his answer. This question was frequently before the late supreme court, and the necessity of specially setting forth the equitable defense was fully recognized (Arguello v. Edinger, 10 Cal. 150; Lestrade v. Barth, 19 Cal. 660); and the doctrine of those cases has been affirmed by this court in Downer v. Smith, 24 Cal. 114, Blum v. Robertson, 24 Cal. 127, and the recent case of Clarke v. Huber [25 Cal. 594]; and we are fully satisfied with our opinions in those cases.

In Clarke v. Huber the defendant relied upon an estoppel in pais, and offered to prove that the plaintiff's grantor, while he owned the land in controversy, pointed out to the defendant the land as the land that he had sold to the defendant's grantor, he knowing that the defendant was about to purchase the land, and that the defendant immediately thereafter purchased and paid for the land. We said: "The decisions of this and the late supreme court require that in actions at common law all equitable defenses should be specially stated in the answer. If they are not so stated, they are waived for all the purposes of the action."

In this case the defense consists of a general denial, a special denial, and the allegation of title in the defendant's landlords, without any equitable defense. It therefore follows

that the facts relating to the equitable title arising upon the estoppel in pais, if proven as fully as we have supposed, for the sake of the argument, do not constitute a defense to this action, because they have not been specially pleaded.

We have not deemed it necessary to consider the question whether Brooks did appear for Partridge in the case, and if so, whether he was under any legal obligation to disclose his title or claim to the plaintiff in the foreclosure suit; nor whether the purchaser could take any advantage of the acts or declarations of Brooks, as the appellant's attorney denies that the purchaser had any knowledge thereof, nor whether sufficient facts have been proven or found to constitute such an estoppel in pais as against the respondent that would preclude him, if the estoppel had been specially pleaded, from proving the truth.

Judgment affirmed.

We concur: Shafter, J.; Currey, J.; Sanderson, C. J.

I dissent: Sawyer, J.

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## L. MEININGER, Appellant, v. JOSEPH GLUCKAUF, Respondent.

## Ex parte MEININGER.

No. 231; February 25, 1864.

**Venue.—In Making an Order Changing the Venue of a Case,** on application of the defendant and accompanying affidavits, the court acts judicially upon a matter within its cognizance, even though the cause shown for the change be insufficient in fact.

**Venue.—The Proper Resort for a Party Aggrieved by an Order** of the trial court granting an application, upon affidavits, for a change of venue is appeal; mandamus does not apply.

Application for mandamus.

Rosenbaum, Smith and Cadwalader for appellant; John S. Berry for respondent.

CURREY, J.—An action was commenced in November, 1863, in the district court in and for the county of Butte, by L. Meininger, plaintiff, against Joseph Gluckauf, defendant, for the recovery of a debt of about two thousand dollars. The plaintiff has applied by petition to this court for a writ of mandamus to be directed to the judge of said district court, commanding him to proceed to the trial of said action, in its order, in the county of Butte. The petition shows that the action was commenced and the court acquired jurisdiction of the parties in the mode provided by law, and that after an issue of fact was joined in the suit, at a term of the district court held in said county, in December, 1863, the defendant applied to the court, on an affidavit, to change the place of the trial of the action from the county of Butte to some adjoining district, on the ground that he could not obtain a fair and impartial trial in said county, because the plaintiff and others, conspiring together "to prejudice the public mind in Butte county against him" respecting the matters in issue joined between the parties, had been busily circulating a report in such county, which he deemed injurious and prejudicial to his interests and safety as a litigant in said district court, and because, second, to the best of his opinion and belief, he could not have a fair and impartial trial of said cause before the judge of said district court, either on questions of law or fact, on account of the bias and prejudice of the judge against the defendant. The judge held the affidavit, on which the defendant based his motion for the change of the place of trial, to be insufficient; and after stating that he was not conscious of any bias or prejudice, or of any reason or fact on which the defendant could predicate such an opinion or belief, decided that, under the circumstances of the imputation thus made, though general in terms, he was unwilling to try the cause, and therefore granted the motion and ordered the place of trial changed from the district court for Butte county to the district court for the county of Yuba.

The order changing the place of trial having been made, the plaintiff, by his attorney, requested the court to set the cause for trial; whereupon the judge thereof refused to comply with the request, and declared that he would not try the cause then, nor at any other time. To the decision granting the order changing the place of trial, and to the refusal of the judge

to try the cause, the plaintiff duly excepted. The facts here stated are set forth in the petition and papers thereto annexed as a part thereof.

Upon this state of facts and circumstances the question is directly presented, Is the petitioner entitled to the writ for which he prays?

It is provided by statute that the writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station, and that the writ shall be issued in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law: Practice Act, secs. 467 and 468.

The duty of a district judge to proceed with the trial of causes pending in his court is a duty resulting from the office which he holds; and whenever it appears that he refuses so to do, it is not to be doubted that this court possesses the power to require him, by mandamus, to proceed to the performance of such duty. But the exercise of this jurisdiction depends upon conditions which must be found to exist in every case, before the court will issue its mandate. If the subordinate officer or tribunal has refused to perform a positive duty, resulting from his office, or by some act equivalent to a refusal has manifested such an intention, it becomes the duty of this court, upon proper application, to issue its mandate to compel the performance of such duty, provided there is not open to the party aggrieved a plain, speedy and adequate remedy in the due course of law.

In the matter before us, it is necessary to determine, in the first instance, whether or not the action above entitled was pending in the district court for Butte county when the plaintiff presented to this court his petition; for if the action had then been transferred by lawful authority to Yuba county for trial, it follows that the judge against whom the writ of mandamus is sought is under no duty to try such action. This seems to be conceded on the part of the petitioner, but it is argued that the order changing the place of trial was not warranted by the proof of any facts whatever, as cause for the change, and that therefore the order was a nullity, leaving the action still pending in the district court, where it was commenced. This position is for the petitioner a necessity, as a

surrender of it would be an abandonment of his application. It may be admitted that the defendant in the action did not, by his affidavit, show any cause for a change of the place of trial, and still it does not result from this that the court had not the power to grant the change, upon the defendant's application. In making the order changing the venue, the court acted judicially upon a matter within its cognizance. By this order, the place of the trial of the action became changed from Butte to Yuba county. If thereby error intervened to the petitioner's injury, it cannot be corrected by means of the writ of mandamus: People v. Judges of Dutchess County, 20 Wend. (N. Y.) 658.

In Chase v. Blackstone Canal Company, 10 Pick. (Mass.) 244, the plaintiff applied for a mandamus to county commissioners, to require them to allow to him certain legal costs, to which he was entitled, upon an assessment of damages to his land, by reason of the construction of a reservoir to the Blackstone canal. The court denied the application, holding, in effect, that when an inferior tribunal had acted in a judicial capacity upon a question properly before it, its determination could not be disturbed by means of the writ of mandamus. In that case the court said, "The writ lies either to compel subordinate judicial tribunals to exercise their functions and render some judgment in cases before them, when otherwise there would be a failure of justice from delay or refusal to act. But when the act to be done is judicial or discretionary, the court will not direct what decision shall be made."

In the case of The King v. Justices of Monmouthshire, 7 Dowl. & R. 334, a petition was made to the court of king's bench for a mandamus to the justices of Monmouthshire, to compel them to enter continuances and hear and determine an appeal, which the justices, being equally divided in opinion on one trial, had failed to decide, and having thus disagreed, an application was made to them to continue the case until the next sessions. The justices refused to grant the continuances, but instead thereof quashed the appeal. Abbott, C. J., with whom Justices Bayley and Holroyd agreed, refused the application for a mandamus, saying: "When the sessions forbear to give any judgment at all, this court will interpose to compel them to go on and pronounce judgment; but when they have actually given judgment, even under a mistake of law,

this court has never yet interposed to disturb their decision. In form, this is an application to enter continuances and hear and determine the appeal; but it is in substance an application to expunge the proceedings which the justices have already taken": See, also, the following authorities: Judges of Oneida Common Pleas v. People, 18 Wend. 89; Ex parte Koon, 1 Denio, 645; Commonwealth v. Judges, etc., 3 Binn. (Pa.) 273; Commonwealth v. Cochran, 5 Binn. (Pa.) 103; Swing v. Inhabitants of Alloway's Creek, 10 N. J. L. (5 Halst.) 58; County Court v. Daniel, 2 Bibb (Ky.), 573.

The writ of mandamus, which, under our statute, may be directed to a subordinate judicial tribunal to compel performance of a duty enjoined by law, is like the writ of procedendo ad judicium, at common law, which issued out of the court of chancery, commanding, in the name of the sovereign, the judges who failed to give judgment, in any suit before them, when it was their duty so to do, to proceed to judgment. But the command was not to give any particular judgment; for that, if erroneous, could be set aside in the course of appeal or by writ of error or false judgment: 1 Blackstone's Commentaries, 109.

If the court should grant the writ in this case, it would, in effect, be a reversal of the order granted changing the place of trial, or the expunging of the order, as a judicial proceeding, from the records where it is entered. This we cannot do. The defendant, upon an affidavit, made in the action, of which the court below had jurisdiction, applied for a change of the place of the trial of the cause. The application being made, it was the duty of the court to hear, consider and decide it. This duty the court performed, and in so doing acted judicially. If by the decision made, the plaintiff in the case sustained injury, the remedy for it is, in legal contemplation, plain, speedy and adequate, by appeal after final judgment: People v. Stillman, 7 Cal. 117; De Barry v. Lambert, 10 Cal. 503.

The application for a writ of mandamus must be denied.

We concur: Sanderson, C. J.; Shafter, J.; Rhodes, J.; Sawyer, J.

JOHN W. SARGENT, Respondent, v. MARTIN PRAGG, Appellant.

No. 342; March 6, 1864.

**Partnership—Right of Surviving Partner to Extend Time.**—It is competent for a surviving partner, closing up the affairs of the firm, to extend an outstanding contract made with the partnership, where such extension seems to him for the interest of the business so being closed up.

C. H. Parker for respondent; Spencer, Reichert & Garber for appellant.

For Opinion on Rehearing, see next page.

SAWYER, J.—This is an action upon a contract for grading a street in San Francisco. The contract was made under the act of 1856 as amended by the act of 1859, and the rights of the parties accrued under those acts. The assessment was levied upon a valuation of the property. Most of the points relied on were raised and decided in Colin v. Seamen and Houston v. McKenna, 22 Cal. 550. We do not feel called upon to reinvestigate the questions as to the powers of the superintendent of streets decided in those cases. The only question raised not determined in those cases is that Sargent, the surviving partner of Martin & Sargent, had no power to bind the firm by stipulation for an extension of time. There is no force in this point. Sargent was the surviving partner, and was empowered to close up the affairs of the firm. An extension of time might have been necessary to prevent a breach of the contract, and to protect the interest of his deceased partner as well as his own. At all events it was competent for Sargent to stipulate for an extension. If he has mismanaged the affairs of the late firm in his hands, he may be liable to the estate of Martin, but the defendant has no cause of complaint.

Judgment affirmed on the authority of the case cited.

We concur: Sanderson, C. J.; Shafter, J.; Currey, J.

OPINION ON PETITION FOR REHEARING.

August 19, 1865.

SAWYER, J.—The first point made on petition for rehearing has been determined against petitioner in Emery v. San Francisco Gas Co. [28 Cal. 345], and the principles of that case must control this. Besides the assessment in this case was made according to value.

As to the second point, the state of facts disclosed by the record does not present the question. If it did, the point was not even suggested on the former hearing, and we should not, unless under very extraordinary circumstances, grant a rehearing to enable an appellant, after being defeated on his chosen ground, to renew the contest upon other points not before brought to the attention of the court or the respondent.

Rehearing denied.

We concur: Shafter, J.; Sanderson, C. J.; Currey, J.

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JOHN W. OWEN, Respondent, v. J. D. MUSTARD et al., Appellants.

No. 4162; April 4, 1864.

**Evidence.—To Disprove Title in the Defendant's Grantor,** a deed executed long after his entry, and the record of a suit begun long after also, to which suit such grantor or the defendant was not a party or privy to a party, are not admissible.

APPEAL from Seventh Judicial District, Solano County.

Whitman & Wells for respondent; M. A. Wheaton for appellants.

SAWYER, J.—The deed from Wing to Rankin, and the record in the case of Rankin v. Owen, introduced in evidence in this case to prove a tenancy in common between Wing and Owen, at the time of the entry of Doughty, defendants' grantor, were inadmissible. The conveyance and suit were long

subsequent to the entry of Doughty, and defendants were not parties to the action, nor does it appear that they, or their grantors, stood in the relation of privies to any party to the suit. These proceedings, therefore, were res inter alios acta, and not binding upon the defendants. The fact of the tenancy in common was relevant, but these proceedings between strangers were incompetent to prove in this action any fact established by the judgment. There was an instruction also based on this record. Although there is other testimony tending in some degree to establish the same point, yet the record was evidently principally relied on by the plaintiff to prove the tenancy in common, and it is highly probable that the verdict was determined by it.

For this error the judgment must be reversed and the cause remanded for further proceedings.

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## E. A. DE LONG, United States Collector, Appellant, v. A. HAINES et al., Respondents.

No. 3935; April 4, 1864.

**Supreme Court—Jurisdiction not Retrospective.**—The jurisdiction of the supreme court, for the purposes of a particular appeal, remains as of the time when the appeal was taken.

**Supreme Court.—The Jurisdiction Given the Supreme Court,** where the validity of a tax is impeached, does not go to the reviewing of a case where the question is, not the validity of the tax, but whether the court appealed from had the power to impose a penalty for not paying it.

APPEAL from County Court of Amador.

R. M. & N. C. Briggs for appellant; S. B. Axtell for respondents.

SAWYER, J.—The plaintiff, as collector of internal revenue, brought this action under the revenue laws of the United States in the court of a justice of the peace for the county of Amador, to recover the sum of fifteen dollars due for a peddler's license, and the sum of forty-five dollars as a pen-

alty for peddling without a license—sixty dollars in the aggregate. The defendants appeared and moved to dismiss the action, on the ground that the court had no jurisdiction of the subject matter, for the reason that the cause of action arose under an act of Congress, and that Congress had no power to confer jurisdiction upon a state court, and on the further ground that two causes of action were improperly joined. The justice denied the motion. The defendants then answered, denying that they were partners, and denying that they had peddled or sold goods without a license, and that they had incurred any penalty under the act. A. Haines, one of the defendants, then alleges affirmatively that he had "taken out a license as required by law for himself and his partner Sam Haines under the style of Haines Bros." This is the whole answer.

On the issues thus presented a trial was had before a jury, a verdict returned, and judgment rendered in favor of the plaintiff.

The defendants appealed to the county court, and in that court the motion to dismiss upon the same ground relied on in the court below was renewed, and the motion granted, the court holding that it could not take jurisdiction. From the judgment of dismissal an appeal is taken to this court.

The respondent insists that this court has no jurisdiction to entertain the appeal, for the reason that the amount in dispute is less than two hundred dollars, and that on this ground the appeal must be dismissed. By article 6, section 4, of the old constitution—which was in force at the time this appeal was taken—the jurisdiction of this court was limited to cases "where the matter in dispute exceeds two hundred dollars," and cases "in which the legality of any tax, toll or impost, or municipal fine is in question," and criminal cases amounting to felony. Clearly, the court has no jurisdiction unless the legality of a tax, etc., is in question.

Admitting that the sum of fifteen dollars demanded for the peddler's license is a tax, within the meaning of this provision of the constitution, we do not see that the legality of the tax is in any way in question. The question presented was a preliminary one, not depending upon the merits of the case. It was a question as to the jurisdiction of the court to entertain the case, raised upon the face of the complaint itself, and the

suit was dismissed for want of jurisdiction of the subject matter. The question presented by the record had no reference whatever to the legality of the tax, it was simply a question as to the forum in which the proceedings should be had to enforce the payment. If we go behind this point and look at the pleadings, we find that the answer raised no question as to the legality of a tax within the meaning of the constitution. It did not question the validity of the law, or deny that the right to the sum claimed would attach upon a proper state of facts. It only denied the fact of peddling without a license, and alleged that the party peddling had procured a license. But the only question brought before this court for review by the record is, Did the court below, admitting the defendants to be liable, have jurisdiction of the subject matter? Was it competent for that court to administer the remedy? This does not in our opinion bring in question the legality of a tax, toll or impost, and admitting for the purpose of the argument that the court below had jurisdiction, the amount in controversy being less than two hundred dollars, this court has no jurisdiction to entertain an appeal. The conclusions we have reached on this question precludes a decision upon the question raised by the appellant.

The appeal is dismissed.

We concur: Sanderson, C. J.; Rhodes, J.; Shafter, J.; Currey, J.

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## L. R. HONEYCULT & CO., Respondents, v. JOHN HOGAN, JOHN BARRY et al., Appellants.

No. 4100; April 11, 1864.

**Partnership—Individual Note of Partner.**—When partners do business under the name specifically of one of them, and that one makes a note which, to the knowledge of the payee, is an individual note, such note cannot be enforced against the partnership.

APPEAL from Fourteenth Judicial District, Placer County.

Hamilton & Williams for respondents; Tuttle & Fellows for appellants.

SHAFTER, J.—The complaint in this action is founded upon a promissory note executed by John Hogan to the plaintiffs for the sum of five hundred dollars, payable three months after date. The complaint charges that Hogan and Barney, joint defendants in the action, were at the date of the note, April 22, 1862, and before and after said date, partners, in the livery-stable business, under the firm name "John Hogan," and that on said day the defendants, under said firm name, and for the use and benefit of said firm, executed and delivered to the plaintiffs the note in question.

Hogan was served but did not appear. In the answer filed by Barney the partnership and partnership name are admitted as they are alleged in the complaint. The answer denies that the signature was put to the note by Barney, or by anyone acting under authority from him, and denies that the note was given on the credit of Barney or on the credit of the firm. It is further averred in the answer that it was stipulated in the partnership contract that each partner should furnish one-half of the "stock" invested in the partnership business, and that the note in suit was in fact given by Hogan on his private account, and "for an individual purchase made by him of the plaintiffs, and for his individual debt."

The trial was by the court. Barney appeals from the judgment and from an order overruling his motion for a new trial.

The principal question raised by the pleadings was whether the note was the note of the firm or the individual note of Hogan. We have examined the evidence and find little or no conflict in it. The testimony of both parties tends with singular directness to prove that the note was the private note of Hogan, given for a debt contracted by him in his own name and for his own individual benefit, and that the plaintiffs accepted the note with the full understanding that the note was not the note of the firm but the individual note of the partner by whom it was executed. This, in our judgment, is a case where a new trial should be awarded, for the reason that the decision on the questions of fact presented by the pleadings was not justified by the evidence.

Judgment reversed and new trial ordered.

We concur: Sanderson, C. J.; Sawyer, J.; Currey, J.; Rhodes, J.

JAMES DONALDSON, Respondent, v. JOHN M. NEVILLE et al., Appellants.

No. 4160; May 6, 1864.

**New Trial.—A Verdict Found upon a Substantial Conflict of evidence is not to be disturbed.**

**New Trial.—Surprise is No Ground for a New Trial when based on testimony which, although disconcerting to the applicant, was that of a notoriously adverse witness well known as such before the trial, and when the precise point upon which such testimony bore was distinctly raised by the pleadings.**

APPEAL from Seventh Judicial District, Solano County.

J. H. Thompson and John Currey for respondent; M. A. Wheaton for appellants.

SHAFTER, J.—This is an action brought to recover damages for the conversion of a span of mules. The real point of the defense was, that the mules were not in fact the plaintiff's property but the property of one Marshal. Counsel for the appellants admit that the evidence on this question of title was in conflict, and it follows that we cannot grant a new trial on the ground that the jury mistook the relative weight of the opposing proofs.

Surprise is also assigned as a ground upon which a new trial should be granted. Miner was an adversary witness, and the precise point upon which his testimony bore was distinctly raised in the pleadings. The testimony of the witness may have been unexpected to the defendants, and it may have greatly disconcerted them; but in view of the state of the pleadings, and of the fact that the defendants had not been misled by previous statements of the witness, they could not have been "surprised" by his testimony to a legal intent: Taylor v. California Stage Co., 6 Cal. 230.

Judgment affirmed.

We concur: Sawyer, J.; Sanderson, C. J.; Rhodes, J.

Mr. Justice Currey, having been of counsel, did not sit on the trial of this case.

## JOSE G. URIDIAS, Respondent, v. JOHN C. MORRILL, Appellant.

No. 247; May 6, 1864.

**Forcible Entry and Detainer.—In a Proceeding for Forcible Entry** and detainer by a landlord to recover possession, a complaint that fails to show the nature and duration of the tenancy under the original letting, while showing the fact of the letting, that afterward the defendant entered, that defendant holds under the person who was the tenant of the plaintiff, that demand was made in writing on the defendant on the —— day of, etc., for possession of the premises so held as aforesaid, and the defendant neglected and refused, etc., shows a possession neither tortious at the time of the demand nor made tortious afterward by the demand.

APPEAL from Third Judicial District Court, Santa Clara County.

J. Alva Yoell for respondent; S. O. Houghton for appellant.

See Uridias v. Morrill, 22 Cal. 473.

SHAFTER, J.—This is an action brought under the thirteenth section of the act concerning forcible entry and unlawful detainers, to recover certain premises described in the complaint.

To the complaint a general demurrer was interposed; the demurrer was overruled, and the defendant answered. The trial was by the court; findings and judgment for plaintiff.

The appeal is from the judgment, and from an order denying a motion for a new trial.

The complaint states that on the 6th of October, 1860, the plaintiff demised the premises in question to one Dotan for one year ensuing said date, at a yearly rent of two dollars per acre. That "after the expiration of said lease, to wit, on or about the first day of December, 1861, the defendant entered upon and came into possession of said above-described premises under said Dotan, who was the tenant of the plaintiff; and said defendant still holds the same. That on the third day of June, 1862, the plaintiff made a demand in writing upon defendant to deliver possession of the premises so held as aforesaid, and defendant neglected and refused, etc."

It is quite obvious, in our judgment, that the facts stated in the complaint do not show, either directly or inferentially, that the possession of the defendant was tortious prior to the date of the demand, or that the demand had the effect to make the subsequent possession unlawful. The complaint shows that on the 1st of December, 1861, Dotan was the plaintiff's tenant. As the nature and duration of the tenancy are not disclosed, and as the pleadings must be taken most strongly against the pleader, we must intend that it was at least a tenancy for years, instead of at will or by sufferance; and if for years then for one year at the least; and the complaint alleges a demand before the year expired, viz., June 3, 1862. That demand cannot be considered as having put the defendant in the wrong, so long as it does not appear that the plaintiff had any right to make it.

Judgment reversed and cause remanded, with leave to the plaintiff to amend his complaint.

We concur: Sawyer, J.; Sanderson, C. J.; Currey, J.

Mr. Justice Rhodes, having been of counsel, did not sit on the trial of this case.

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J. GORDON, Appellant, v. H. DICKINSON et al., Respondents.

No. 4174; May 6, 1864.

**Evidence—Oral Testimony of Witness to Discredit His Affidavit.** Oral testimony of a man and woman to the effect that they are not husband and wife, given to avoid a sheriff's sale for the man's debt of property in the woman's name levied upon as community property, is not to be credited, as against their previous affidavits made in another matter that the marriage relation exists between them.

APPEAL from Fourth Judicial District, San Francisco County.

Sharps for appellant; Clement, Smyth & Clement for respondents.

SANDERSON, C. J.—This is an action of ejectment brought upon an execution title. The case was tried by the court without the intervention of a jury. The judgment was for the plaintiff, and thereupon the defendants moved for a new trial, which was denied. The appeal is taken from the judgment, and the order denying the motion for a new trial.

The premises in question were sold under execution against the defendant Harvey Dickinson and purchased by the plaintiff, who, in due course of law, obtained a deed therefor from the sheriff by whom they were sold. At the time of the levy and sale the property stood in the name of M. N. Cowen, who, as the plaintiff alleges, was the wife of Harvey Dickinson, which, however, is denied by the other side. The plaintiff claims that the property is the common property of both, and therefore liable to be taken in execution for the husband's debts. The defendants claim that the property is the separate estate of M. N. Cowen, alias Dickinson. M. N. Cowen also interposes a claim of homestead. The principal question at the trial was as to whether the defendants Dickinson and M. N. Cowen Dickinson were husband and wife. In support of the allegation that they were such the plaintiff offered proof of cohabitation and reputation and a judgment-roll in a certain action brought by them as husband and wife, some time prior to the present action, and two affidavits made in said action, one of them by Dickinson, and the other by M. N. Cowen Dickinson, in which each swears that they are married. To contradict this evidence the defendants offered themselves as witnesses, and were allowed by the court to testify in the case under the exception of the plaintiff. Each swore that they were not and never were married, thus convicting themselves of perjury at the time they made the affidavits above mentioned. Upon the point of marriage the language of the affidavit of Dickinson is as follows: "And deponent further says, that in the year 1850, in the city of San Francisco, he became by marriage the lawful husband of said Margaret Dickinson and that he has ever since continued her husband, and that he, this deponent, and said plaintiff Margaret Dickinson have ever since their said marriage lived together as husband and wife." It is stipulated in the record that the affidavit of M. N. Cowen Dickinson is to the same effect. Such witnesses are unworthy of belief, and it

is a matter of surprise that they were allowed to stand in the presence of the court and shamelessly convict themselves of willful perjury, from the consequences of which they are only shielded by the statute of limitations. They should have been ordered from the witness-stand polluted by their presence. The court found that they were married and the finding was right.

These witnesses were also relied upon to prove that the property in question was the separate property of M. N. Cowen Dickinson and that it was also her homestead. We are not surprised that the court found both propositions against them. Falsus in uno falsus in omnibus.

Judgment affirmed.

We concur: Sawyer, J.; Currey, J.; Shafter, J.; Rhodes, J.

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JOHN QUINN, Respondent, v. BRENNUS KENYON, Appellant.

No. 4180; May 6, 1864.

**Appeal—Motion for New Trial—Insufficiency of Statement.**—If the notice of a motion for a new trial designates as its ground the insufficiency of the evidence to justify the verdict, and the statement fails to specify the particulars in which such evidence lacks sufficiency, the statement is to be disregarded.

APPEAL from Fifth Judicial District, San Joaquin County.

J. B. Hall and J. A. Booker for respondent; Budd, Carr & Byers for appellant.

SHAFTER, J.—This is an action for an alleged forcible entry and detainer. The trial was by jury who returned a verdict for the plaintiff. The defendant moved for a new trial, which motion was denied by the court, and the appeal is taken from that order and also from the judgment.

There is no statement on appeal from the judgment. The judgment is supported by the verdict, and there are no defects in the complaint.

The notice of motion for a new trial states that a new trial will be asked for, on the ground of "errors in law occurring at the trial," and on the further ground of the "insufficiency of the evidence to justify the verdict and that the verdict is against law."

The act of 1863, amendatory of the Civil Practice Act, provides that the notice of motion for a new trial "shall designate generally the grounds upon which the motion will be made," and we consider that the notice given by the appellant complies substantially with this requirement. But the act of 1863 further provides, that "when the notice designates as the ground upon which the motion will be made, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded." In this case there is a statement in support of the motion for new trial in which all the evidence produced at the trial, both oral and documentary, is set forth; but the foregoing requirements of the act of 1863 have not been complied with in any particular. The act dictates the consequences: "the statement shall be disregarded."

Judgment affirmed.

We concur: Sawyer, J.; Sanderson, C. J.; Currey, J.; Rhodes, J.

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JOHN B. FRISBIE, Respondent, v. LEVI H. WHITNEY, Appellant.

No. 4020; May 6, 1864.

**Forcible Entry and Detainer is a Proceeding Highly Penal in character, and must be confined to cases specified in the statute.**

**Forcible Entry and Detainer may not be Resorted to upon Facts sufficient to justify the institution of an action of ejectment.**

APPEAL from County Court of Napa County.

Wallace, Royle & Edgerton for respondent; Horrell, Moore & Laine for appellant.

SAWYER, J.—We think the facts of this case, as shown by the evidence, insufficient to maintain the action of forcible entry and detainer. The entry was peaceable. Admitting that the entry was unlawful, within the meaning of the statute relating to this action, as heretofore construed by the supreme court, there is no sufficient evidence of a forcible detainer to justify a recovery.

The facts proved would be sufficient to authorize a recovery in an action of ejectment, but not in an action for an unlawful entry and forcible detainer. The latter action is highly penal in its character and must be confined to the cases specified in the statute. To sustain the recovery in this case would be to abolish all distinctions between the actions of ejectment, and forcible entry and detainer. The motion for a nonsuit should have been granted.

Judgment reversed and the court below directed to enter a judgment of nonsuit.

We concur: Sanderson, C. J.; Shafter, J.; Rhodes, J.

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## GEORGE SAYER, Appellant, v. T. McNULTY et al., Respondents.

No. 225; May 6, 1864.

**Corporate Stock.—An Instrument Intended to Convey Shares of Stock** of a person for nonpayment of assessments, but containing no allusion to him by name, not signed by him personally or for him by another under express power, and not consented to by him, is not good as a bill of sale.

**Corporate Stock—Authority to Sell for Assessments.—Under a Power**, by virtue of merely the articles of agreement of a company, to sell shares of members for nonpayment of assessments, such articles not showing in that connection the manner of sale, one cannot sell shares validly at private sale and without notice to the owner.

**Agency.—A Contract by an Agent cannot Bind the Principal** if it does not show on its face that someone other than the signer is intended to be bound by it.

APPEAL from Tenth Judicial District, Sierra County.

The suit was in ejectment against McNulty and twelve other persons. The plaintiff alleged in his complaint lawful possession and ownership in him of, and title to the possession of, property described as "one full undivided thirty-second part of the following piece or parcel of land and mining ground," etc., and set forth the other usual allegations, all of which were denied in the answer. The suit was resisted orally on the ground that assessments on the plaintiff's fractional share had accumulated during his absence from the mine and, according to the evidence, this fractional share, without the plaintiff's knowledge, had been made the subject of a bill of sale, the other shareholders acquiescing. The instrument ran thus:

"Goodyear's Bar, April 30th, 1859.

"Know all men by these presents that I have this day sold to John Dooly one-half claim in the Richardson Company situated on Fir Cap at the head of Goodyear's Creek for the sum of thirty-nine dollars, $39.00, said half claim being one-half of 1/16 of all the ground claimed or owned by said Richardson Company, together with an equal interest in all the privileges enjoyed by said Richardson Company, said interest being sold to pay assessments due on the same.

(Signed) "PATRICK DONAHUE."

Donahue, being sworn on the part of the defendant, said he was foreman when the instrument was made. He said also the company had never had any formal articles of incorporation, but only what he called "a contract or by-laws," which he had kept in his cabin but which had disappeared. He could repeat it from memory however. A copy was admitted in evidence, over the plaintiff's objection; by this it appeared that the plaintiff signed as a party to the contract, and that the latter contained this clause: "Each person shall pay in his assessments at the end of every two weeks, and in case of any person failing to pay at the end of four weeks his claim shall be forfeited to the company, and the foreman shall have power to sell the same for the assessments."

Williams, Johnson & Haymond for appellant; Van Clief & Bowers and Searls for respondents.

SAWYER, J.—We think the bill of sale introduced in evidence by defendants inadmissible. It does not purport to be the act of plaintiff or to have been executed by his authority. There is no allusion whatever to plaintiff in the document. Giving to the agreement organizing the company the most favorable construction for the defendants, the most that can be said of it is, that it authorizes the foreman of the company, as plaintiff's attorney in fact, to sell his interest in the claims of the company for nonpayment of assessments, and convey a title. The bill of sale does not purport to sell plaintiff's interest. It does not appear whose interest was sold. It might have been any other one-half of one-sixteenth interest in the whole company. Donahue does not sign it, or appear in the body of the instrument to act, as foreman of the company or as agent for plaintiff or any other party. He does not purport to execute in pursuance of a power. There is something more than a latent ambiguity to be explained, within the well-established rule of evidence upon that subject. All that appears in the instrument is that a fraction of the claim of the Richardson Company was sold by G. P. Donahue, to John Dooly, for nonpayment of assessments. Everything else is to be supplied by proof aliunde. The instrument in question, so far as anything to the contrary appears on its face, might just as well have been made to do duty as evidence, on a sale of a similar fraction of any other of the thirteen members of the company.

The case is not one where the owner of property places it in the hands of an agent for the purpose of sale upon general or special instructions. In such a case less formality might be required. But in this instance there is a naked power to sell in case of default to enforce the payment of assessments. As to the owner the sale takes place in invitum. The precise mode to be pursued is not pointed out in the articles of agreement containing the power, but in such case it would doubtless be necessary that the sale should be at public auction, upon a reasonable notice in order that the property might not be sacrificed. The document under consideration does not show the mode of the sale, or make any reference to the authority under which it was made, or to the owner of the interest sold.

There is much confusion in the authorities as to what instruments, not under seal, executed by agents shall be considered as contracts binding upon the principal. But we think it will be found that it must appear upon the face of the contract itself that the agent intended to bind some other party and not himself. But the cases in which great latitude of construction has been given in this respect are those where the principal has intrusted the agent with authority to act for his interest and benefit, and where his will is supposed to be consulted and carried out, and not cases of the exercise of a power to make sales for the purpose of enforcing a remedy which some other party has against the principal.

We think the bill of sale from Donahue to Dooley entirely too indefinite and uncertain in its terms to be admissible as evidence against the plaintiff. It was admitted and for this error the judgment is reversed and the cause remanded for a new trial.

We concur: Sanderson, C. J.; Currey, J.; Shafter, J.; Rhodes, J.

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W. P. C. STEBBINS, Respondent, v. JAMES SMILEY et al., Appellants.

No. 4085; May 10, 1864.

**New Trial—Specification of Grounds.**—Under the law of 1861 (Stats. 1861, p. 590) the grounds for a motion for a new trial shall be specifically set forth, and the statement shall contain only so much of the evidence, or such reference to the evidence, as may be necessary to explain them.

**New Trial.—A Specification of the Errors Relied on** for the granting of a new trial must be contained in both the motion and the statement.

**An Appeal Taken for Delay Merely is to be Disposed of by** being affirmed with damages.

APPEAL from Fourth Judicial District, San Francisco County.

Stout for respondent; Crockett & Crittenden for appellants.

SANDERSON, C. J.—The transcript in this case contains seven hundred and forty-five pages of manuscript, seven hundred of which might have been omitted without detriment to the appellant. The action is for an accounting and settlement touching a certain contract, for the construction of a prison wall, between plaintiff and defendants on the one part, and the state of California on the other. The case was tried by a referee, who found for plaintiff, in twenty-three distinct findings, and reported a judgment in his favor for the sum of thirteen thousand seven hundred and fourteen dollars and sixty-three cents, subject to a credit of one thousand dollars if paid by defendant Dall. The defendants moved for a new trial upon the grounds: First. That the evidence is insufficient to sustain the findings. Second. Errors of law occurring at the trial and excepted to by defendants.

There is, neither in the notice of motion for new trial, nor in the statement, a specification of the errors upon which the appellants rely for a new trial; nor is there any specification of the findings which they claim to be contrary to the evidence. This motion was made under the law of 1861 (Stats. 1861, p. 590), which provides that: "The grounds of the motion shall be specifically set forth, and the statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain them and no more." That this rule has been grossly disregarded in this case is manifest. It can hardly be expected that this court will wander through seven hundred and forty-five pages of manuscript in search of evidence to support every one of twenty-three findings; or in search of errors in law, if such there be, to support the general charge of the appellants to that effect. As this objection to the statement is made by counsel for the respondent, we have no hesitation in giving it full weight, and affirming the judgment upon the ground that the statement fails to comply with the conditions imposed by the statute. We are asked to allow the respondent twenty per cent damages, and, being satisfied that the appeal has been taken for the purpose of delay, we affirm the judgment with ten per cent damages.

Judgment affirmed, with ten per cent damages.

We concur: Rhodes, J.; Currey, J.; Sawyer, J.

J. G. DOLL, Appellant, v. G. W. McCUMBER, Respondent.

No. 3999; May 10, 1864.

**Appeal—Necessary Papers—Waiver by Opposing Party.**—The grounds for a notice of motion for a new trial, on which a party relies on appeal, should, so far as they relate to the matters appearing in the statement, be shown in some manner in such statement; however, unless objected to by the opposing party, the appeal will be heard as if they were so shown.

**Appeal—Sufficiency of Evidence—Question, How Raised.**—Under the Practice Act the sufficiency of the evidence on which the trial court based its findings or the jury its verdict can be questioned only on a motion for a new trial; and these questions can be reviewed only on appeal from the order disposing of such motion.

**Pleading—Supplemental Answer.**—Under Leave to File Amendments to his answer a defendant may file an amended and supplemental answer, unless the opposing party shows that he is prejudiced thereby.

APPEAL from Ninth Judicial District, Shasta County.

Earll & Myrick, R. T. Sprague and Cadwalader for appellant; J. D. Mix for respondent.

RHODES, J.—The appeal is taken from the judgment, and not from the order overruling the motion for a new trial.

A statement was made by the plaintiff, on his motion for a new trial, which was settled by the judge who heard the cause, and which it was agreed should constitute the statement on appeal. It does not contain the grounds upon which the plaintiff intends to rely on his appeal, and the parties have not stipulated that the grounds of the motion for a new trial appearing in the notice of the motion shall constitute a part of the statement on appeal. The grounds on which a party relies on appeal, so far as they relate to the matters appearing in the statement, should in some manner appear therein. But as the respondent has made no objection to the statement on that point, the case will be considered as if the grounds in the notice were incorporated into the statement on appeal.

The first three grounds relate to the sufficiency of the evidence to justify the findings of fact by the court. However

much we might be inclined to reverse the action of the court on that ground, and particularly in respect to the effect of the license granted to the plaintiff, yet we are unable to do so, because an appeal has not been taken from the order overruling the motion for a new trial.

The questions as to the sufficiency of the evidence to warrant the verdict or the findings of fact can, under the Practice Act, be raised only on motion for a new trial, and the only manner that the action of the court upon those questions can be reviewed is on appeal from the order granting or refusing the new trial.

The next two grounds are the refusal of the court to strike out a portion of the defendant's amended answer, and to strike out the whole answer, upon the motion of the plaintiff. The reasons assigned in the motions were that the amendments were inconsistent with the original answer, and with each other. The amendments were evidently framed as an amended answer. The court gave the defendant leave to file an amendment to his answer, but, instead thereof, he filed an "amended and supplemental answer," but an objection on that ground would scarcely be allowed, at least the opposite party must show that he was prejudiced thereby. Such being the case, it is immaterial that the amended answer was inconsistent with the original answer. We do not see any material inconsistency in the several allegations of the amended answer.

The remaining point is that the court erred in rendering judgment for the defendant. The facts found by the court clearly authorized and required the judgment to be entered as was done. The plaintiff insists that the license of the defendant, to the plaintiff, to cut hay upon certain land, was sufficient to give the plaintiff the title to the hay cut by him on such land. There is apparently some inconsistency in the findings upon this point, but, taking all the findings together, they amount to this: that the defendant did not object to the plaintiff's cutting hay upon his (the plaintiff's) own land, but did object to his cutting it on the defendant's land.

Judgment affirmed.

We concur: Sanderson, C. J.; Currey, J.; Sawyer J.; Shafter, J.

HIRAM LOUDERBACK et al., Respondents, v. JOHN DUFFY, Appellant.

No. 278; June 6, 1864.

**New Trial—Death of Judge—Appeal.—Where the Record is not definite in respect to the facts, and the disposition of the motion for a new trial has been made by a judge other than the trial judge, then dead, the court on appeal is not justified in overruling the discretion of the court below.**

Wallace & Royle for respondents; T. J. Tucker for appellant.

SANDERSON, C. J.—This is an appeal from an order granting a new trial in an action brought under the statute concerning forcible entry and unlawful detainer. It is impossible to determine from the record whether a new trial ought to have been granted or not. The judge by whom the cause was tried died before the statement on the motion for a new trial was settled, and, the attorneys being unable to agree, his successor was compelled to decide between them without any knowledge of the facts. This circumstance seems to have had some influence with him in granting the new trial.

The principal question argued in this court is as to the admissibility of evidence of a certain writ of habere facias possessionem under which the defendant's landlord was put in possession of the premises in controversy, and under which the plaintiffs were dispossessed. This writ was admitted in evidence on the part of the defendant under the exception of the plaintiffs. The record does not disclose facts sufficient to enable us to determine whether the writ was properly admitted. When the action in which the writ was issued was commenced does not appear; nor does it appear whether a notice of lis pendens was filed; nor whether the plaintiffs were in possession before or subsequent to the commencement of the action; the only fact which does appear, bearing upon the question of the admissibility of the writ, is that the writ did not run against the plaintiffs by name; but non constat that they did not go into possession, under the defendant in the action, after the suit was commenced, and after notice of lis

pendens was filed, in which case they would have been bound by the judgment and the sheriff could have lawfully executed the writ against them.

It being impossible to ascertain from the record what the real merits of the motion are, we would not be justified, in view of the manner in which the statement was prepared and settled, in overruling the discretion of the court below, especially in granting a new trial. Under the peculiar circumstances of this case, the granting or refusing a new trial rested very much in the discretion of the court below.

Order affirmed.

We concur: Rhodes, J.; Currey, J.; Sawyer, J.; Shafter, J.

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W. A. PRADER, Respondent, v. JOEL MERCHANT and HENRY COLE et al., Appellants.

No. 3486; June 6, 1864.

**Venue—Change for Convenience of Witnesses.**—Where the court is satisfied from the affidavits that the convenience of witnesses requires the action to be tried in the county in which it was brought a change of venue should be denied.

APPEAL from Sixth Judicial District, Sacramento County.

E. B. Crocker for respondent; Geo. Cadwalader for appellants.

SHAFTER, J.—This is an appeal from an order refusing to change the place of trial. The change was moved for by the defendants, and on the ground that they were residents of the county of Sonoma, to which county they sought to have the case transferred from Sacramento county, where the action was brought.

The plaintiff resisted the motion on the ground that the convenience of witnesses required that the case should be tried in the county of Sacramento.

On inspecting the affidavits used on the hearing of the motion in the district court, we are satisfied that there was no

abuse of discretion on the part of the court in denying the motion: Sloan v. Smith, 3 Cal. 410; People v. Fisher, 6 Cal. 154; Loehr v. Latham, 15 Cal. 418.

The order is affirmed.

We concur: Sanderson, C. J.; Sawyer, J.; Currey, J.; Rhodes, J.

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## JACOB A. MORENHOUT, Appellant, v. HARVEY S. BROWN, Respondent.

No. 3927; June 6, 1864.

**Pleading—Construction Against Pleader.**—The allegations of a complaint are to be construed most strongly against the plaintiff, since it is to be presumed that a pleader will set out the aspect of the case most favorable to himself.

**Deeds—Assumption of Mortgage—Rights Between Grantees.**—If A owns land subject in part to a mortgage and contracts to sell this land to B, reserving a number of acres indefinitely as having been contracted to be conveyed to C, and subsequently deeds are made to C and B successively, B assuming the mortgage in his, there has been here no contract between B and C so that B must save C's land from being foreclosed upon.

**Deeds—Volunteer.**—**By Joining in a Deed Unnecessarily,** unasked and as a volunteer only, a person creates no relations with the grantee or, a fortiori, with his assign whereby he may make the latter account to him in any way with reference to the transaction.

APPEAL from Fourth Judicial District, San Francisco County.

A widow and her son, of the name of Bernal, became, by the death of the husband and father, owners of two certain ranchos in the county of San Francisco. They sold portions from time to time and, on September 20, 1856, conveyed to one Higuera "all the land unsold" except one hundred acres, indefinitely mentioned and to which reference will be made below. The plaintiff was agent for the Bernals and for selling for them in the city of South San Francisco part of the property was to receive money commissions. The one hundred acres above mentioned were to be conveyed to him for

past services. The land was encumbered with several mortgages, among them one for eleven thousand dollars held by one Moss, the principal and interest of which was overdue on the 4th of June, 1857, when, as was averred in the complaint: "An agreement by parol was made between the plaintiff and defendant and the said Bernals, by which it was agreed that the lands conveyed to Higuera should be reconveyed to the Bernals, that they should convey to the said Brown all the unsold lands (with certain exceptions and reservations, which are the same excepted and reserved in the deed to him); that Brown should assume and pay off the mortgages, and the said obligation to convey or assure to the plaintiff the said one hundred acres, and pay to the said Bernals five thousand dollars." The complaint further says: "The defendant was and for a long time before had been the counsel and legal adviser of the plaintiff and the plaintiff had great confidence in his advice," etc.; but nowhere says that the defendant was acting as the plaintiff's counsel and legal adviser in this particular transaction or was managing the matter for the plaintiff in any such capacity.

The other essential facts are made by the court to appear in its decision.

B. S. Brooks for appellant; Hoge & Wilson for respondent.

SAWYER, J.—We are of the opinion that the facts stated in the complaint do not constitute a cause of action against Brown. The presumption is that the pleader will state the facts in the light most favorable to himself, and for this reason the allegations of the complaint must be construed most strongly against the plaintiff.

The allegations of the complaint represent the plaintiff as taking an active part in the transactions set out, but we must construe his acts with reference to his relations to the subject matter of the contract, and viewing them in this light, we think the facts stated do not present the plaintiff and defendant in the relation of contracting parties, as to each other. It is true the plaintiff is in form embraced in the allegations relating to the transactions between the Bernals and Brown as though he was an actor in his own right, but the facts alleged show that he had no interest in the subject matter of the sale

from the Bernals to Brown. His action was clearly only in the character of agent in the negotiations between the Bernals and Brown. His relations as party in interest were with the Bernals, who were the owners of the lands described in the complaint.

At some time—not stated—before June 4, 1857, it was agreed between the Bernals and plaintiff that he was to have for his past services as their agent, a conveyance of one hundred acres of said land "in that part called the Rincon de las Salinas." In September, 1856, the Bernals conveyed to one Higuera all the said lands then unsold except the "one hundred acres" due the said plaintiff. This hundred acres does not appear to have been located prior to June 4, 1857, otherwise than it was to be "in that part called the Rincon de las Salinas." On the 4th of June, then, the legal title to all the lands except the unlocated hundred acres due from the Bernals to plaintiff was in Higuera, and the title to the excepted one hundred acres due plaintiff was still in the Bernals. On that day Brown purchased of the Bernals the tract which had been conveyed to Higuera, with certain specified exceptions, but not the hundred acres due plaintiff.

According to the allegations of the complaint, it was agreed that Brown "should assume and pay off the mortgages and the said obligation to convey or assure to the plaintiff the said one hundred acres and pay to said Bernals five thousand dollars." Here, then, seems to be some inconsistency in the allegations, because Brown is alleged to have assumed the obligation to convey the hundred acres, which were not to be, and in fact never were, conveyed to him.

To enable the Bernals to carry out the arrangement with Brown, Higuera reconveyed to them, and the plaintiff joined in the deed. It does not embrace the hundred acres to which the plaintiff was entitled, and it is not shown that he had any interest whatever in the premises conveyed; on the contrary, the entire legal title to the lands so reconveyed appears to have been in Higuera. It does not appear that plaintiff was requested or desired by Brown to join in the deed. He was, so far as is shown by the complaint, a mere volunteer in this respect, thrusting himself into the transaction without interest or motive. In pursuance of the agreement the Bernals then conveyed to Brown with specified exceptions, among which

were two tracts, one of forty and one of sixty acres, to be conveyed to plaintiff, making his hundred acres—and at the same time, as a part of the same transaction, the Bernals conveyed these two tracts to plaintiff.

At the point of time immediately before the delivery of these conveyances to Brown and plaintiff, the legal title stood precisely as it did before the conveyance to Higuera—that is to say, in the Bernals, subject to their agreement to convey to plaintiff one hundred acres not yet located except that it was to be in "that part called the Rincon de las Salinas." The only right the plaintiff had was to have his land located and conveyed to him by his employers, the Bernals. The lands were already subject to the several mortgages set out. The plaintiff alleges "that the said mortgages did not cover the whole of the lands conveyed to the defendant, and the said plaintiff was desirous and insisted that the said one hundred acres should be reserved and conveyed to him out of the land not covered by the said mortgages, but the said defendant advised the plaintiff to take them as the same are described in the deed to plaintiff, and within the lands mortgaged to J. Mora Moss, which he pretended were the best situated lands, and representing and promising that the lands conveyed to the plaintiff should be freed from all encumbrances, before or as soon as those reserved to the said Bernals and that immediately, and promised to take the same from the plaintiff and pay him for the same at a fair price immediately, etc. That at this time the said defendant was and for a long time before had been the counsel and legal adviser of the said plaintiff, and plaintiff had great confidence in his advices, representations, promises and assurances and relying upon the said promise and representations and upon the performance of his said agreement to pay off the said mortgages plaintiff consented to take and did take the said two tracts of land in the place where the same are located in the deed to plaintiff," etc.

It will be observed that it is nowhere alleged that the plaintiff was entitled by the contract with the Bernals to have his land located on the lands not covered by the mortgage. He "was desirous and insisted" that it should be so located. He was entitled to have it "in that part called the Rincon de las Salinas," but nowhere else. It does not appear that the location was finally made outside of said portion, nor does it

appear whether "that part called Rincon de las Salinas" was free from the mortgage or not, and under the rule of construction already stated we cannot intend that it was, nor can we presume that there was any right in plaintiff to locate on any lands not covered by the mortgages, or that he had any right of selection at all. But whether he did have a right of choice or not, the fair construction of the pleadings is, that he was in fact permitted to make his choice, and acting upon the advice and suggestion of Brown, that the forty and sixty acre tracts were the best located, he selected them, notwithstanding the mortgage, and having made his selection the lands selected were conveyed to him by the Bernals, and the remainder to Brown.

Upon the state of facts as alleged, when tested by the well-established rules of construction, there is no contract shown between Brown and plaintiff; there was no consideration passing between them which could support a contract; Brown bought nothing of plaintiff; plaintiff conveyed nothing to Brown; Brown purchased of the Bernals simply what was left after plaintiff had selected the hundred acres which they had agreed to convey to him; Brown made no promise other than that he made to the Bernals as the consideration of his purchase from them. Brown got no consideration for any such promise. His liability was not diminished or increased by the selection for he was bound to the Bernals to pay the mortgage in any event, and the plaintiff parted with nothing—no fraud is charged upon Brown. His advice as to the selection and assurance that he would pay off the mortgage in accordance with his contract with the Bernals were given in good faith, so far as appears from the complaint, and was a mere representation of his intention to carry out his contract with them. If the plaintiff, satisfied with this advice and these assurances, made his selection and the land selected was ultimately swept away by the mortgage, it was his misfortune—he simply exercised his privilege of selection with a full knowledge of all the circumstances, and having made his selection took his deed from the Bernals, the only party who received any consideration from him, and the rest was deeded by the Bernals to Brown. We cannot see that there was any consideration moving from the plaintiff or from anybody else on his behalf to Brown.

It is stated that plaintiff relied on the advice, promises and assurance of Brown, and consented to take the said two tracts of land. But it is not alleged that these were the consideration of the selection. What did the plaintiff give in exchange for these tracts? He simply had a claim, without a right of selection, to an undivided or unlocated hundred acres in a larger tract consisting of that part of the Rancho called Rincon de las Salinas, which part we must intend from the allegations of the complaint, there being no averment to the contrary, was all subject to the same mortgage. He was, however, permitted to take his choice in location, and there was a motive for making the selection he did, but no legal consideration sufficient to support a contract as between him and Brown.

The appellant, on page 11 of his last brief, says: "In the present case, the defendant's promise formed the consideration of plaintiff's deed to the Bernals, made at defendant's request, and the suit is to enforce that agreement." But plaintiff, as before stated, conveyed nothing to the Bernals He joined in the deed of Higuera, but he is not shown to have had any interest whatever in the property conveyed by that instrument, and it is not averred that the plaintiff requested him to join in that deed. This act, then, constituted no valid consideration for Brown's promise. It is also said that plaintiff surrendered his right to the commission for sale under his power of attorney by this arrangement and this was a valuable consideration. The Bernals could doubtless at any time have dispensed with his agency and revoked their power of attorney, but it does not appear that he did surrender his commission. He seems to have negotiated this very sale between the Bernals and Brown, and, for aught that appears in the complaint, he received, or was entitled to receive, his commissions for the sale from his employers the Bernals. His hundred acres and commissions already earned seemed to be in danger of being swept away by the mortgages already on the land, and it was doubtless an object to him to get another party supposed to be responsible interposed between the Bernals and their creditors, as an additional safeguard to his claims against the Bernals, and this may have stimulated his efforts in negotiating the sale from the Bernals to Brown, but it does not form a consideration as between himself and

Brown. There being no contract between Brown and the plaintiff by which Brown, upon any valid consideration, agreed to discharge this encumbrance, no personal liability in favor of the plaintiff arises against Brown in consequence of the sale of plaintiff's land under the decree foreclosing the mortgage of Moss. Brown's contract, upon a fair construction of the facts alleged in the complaint, was clearly with the Bernals, and any liability that might accrue by reason of his failure to discharge their indebtedness to Moss would accrue to them only. But the plaintiff does not claim by virtue of an assignment of any cause of action from the Bernals. His theory is that a liability accrued to him directly against Brown. If the plaintiff has any remedy, it seems to us that it must be against the Bernals upon their covenants with him. His contract was with the Bernals. He rendered his services to them, the consideration moved to them, and from them he received his conveyance. Brown never owned or held the title to the lands conveyed to plaintiff. On the contract set out no personal liability legally or equitably accrued to him against Brown.

Nor did the plaintiff become subrogated to the rights of Moss, the mortgagee. Had he in consequence of his interest in the forty acres, and for the purpose of protecting that interest, paid to Moss the amount due on his mortgage, he might have become subrogated to Moss' rights, and might have compelled Moss to assign to him his security which he could have enforced against the other lands covered by the mortgage. In such a case Moss would probably be a necessary party to the suit. But he did not pay to Moss the amount due him. On the contrary, the amount remained unpaid, and Moss foreclosed his mortgage and sold the very lands covered by the mortgage to satisfy his demand. Brown made a subsequent compromise with Moss by which Moss took a part only of the lands in consideration of Brown's releasing his claim to the rest. And he and Brown mutually released to each other. But Brown could not convey to Moss any interest in the forty acres for the reason that he had none to convey. Moss acquired his interest in it, if he has any, by virtue of the sale and conveyance under the decree of foreclosure. But it does not appear that plaintiff was a party to the suit for fore-

closure. If he was not, his interest still remains unaffected by the proceedings in the foreclosure suit, and doubtless the claim is barred by the statute of limitations—if not, the judgment would seem to be satisfied by the various proceedings set out in the complaint. If he was a party to that suit and had any rights in the premises, he ought to have set them up and demanded that the decree should be so framed as to protect him by requiring that all the other portions of the mortgaged premises should be sold first, and that his forty acres should only be sold in case the proceeds should be insufficient to satisfy the amount due on the mortgage. By virtue of the proceedings set out, the debt to Moss has been satisfied, and the lien as to that portion of the mortgaged premises released by Moss to Brown has become discharged and is now extinct. There is no lien to which plaintiff could be subrogated. The case in its results substantially stands thus: The Bernals owned a tract of land subject to a mortgage to Moss. They were under obligations to convey one hundred acres to plaintiff, but whether to be conveyed subject to, or discharged from, the lien of the mortgage does not appear. They agree with Brown to convey to him the tract except the hundred acres, and Brown, in consideration thereof, agrees to pay off the encumbrances, and pay the Bernals five thousand dollars in cash. The Bernals convey the hundred acres to plaintiff by deed without covenants as we must presume, and the remainder to Brown. Brown fails to pay off the encumbrances; the mortgage is foreclosed and the premises are sold to satisfy it. By a compromise with the purchaser Brown secures a release of a part, and the part retained by the purchaser at the mortgage sale includes forty acres of the one hundred conveyed to the plaintiff. We think upon this state of facts there is no principle known to courts of law or equity independent of any valid contract between plaintiff and Brown by which plaintiff can call upon Brown personally to pay the value of the forty acres, or by which plaintiff is entitled to have the value of such land enforced as a lien upon the lands of Brown not sold under the foreclosure suit. And we have seen before that there was no contract between Brown and the plaintiff.

From the facts stated we must conclude that the plaintiff was acting in the whole matter as the agent of the Bernals.

That he was interested in securing his commissions, and his hundred acres from the Bernals, is doubtless true, and perhaps under his power of attorney set out he was entitled to commissions for negotiating this very sale. He doubtless expected by this sale to secure his demands against the Bernals. But still this only brings him into relations as a contractor with the Bernals and not with Brown.

The authority referred to by appellant's counsel upon the subject of dealings between attorney and client do not appear to us to have any application to this case.

The view we have taken of the case renders it unnecessary to consider the other questions discussed in the briefs of counsel.

The conclusion to which we have arrived is that there was no error in sustaining the demurrer. The judgment is therefore affirmed.

We concur: Shafter, J.; Rhodes, J.; Sanderson, C. J.; Currey, J.

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JOHN LOMAX, Respondent, v. EZEKIEL COOPER et al., Appellants.

No. 225; July 11, 1864.

**Appeal.—The Findings of a Referee are not to be Disturbed if there was sufficient evidence in the case to sustain them.**

APPEAL from Twelfth Judicial District, San Francisco County.

W. P. C. Whitney for respondent; J. B. Crockett for appellants.

SANDERSON, C. J.—This action was brought to enjoin the defendants from removing a building from a lot in the city of San Francisco alleged to belong to the plaintiff. The case was tried by a referee who found the facts and reported a judgment in favor of the plaintiff, from which the defendants appeal.

The only point made by counsel for appellants is that the finding of the referee is contrary to the evidence. We have carefully read all the evidence contained in the record and are satisfied that it fully sustains the finding.

Judgment affirmed.

We concur: Currey, J.; Sawyer, J.; Shafter, J.

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PEOPLE, Respondent, v. RAMON GUITEREZ, Appellant.

No. 259; July 11, 1864.

**New Trial—Questions not Excepted to.**—Questions arising upon rulings of the court during the trial and not excepted to at the time cannot be raised as grounds for a motion for a new trial.

APPEAL from County Court, Tuolumne County.

Charles E. Brown, District Attorney, for respondent; J. D. Redmond for appellant.

CURREY, J.—The defendant was indicted and tried for grand larceny, and found guilty thereof and sentenced to the state prison.

On the trial the defendant offered to prove that he was drunk at the time the alleged larceny was committed. To this the district attorney objected on the ground that drunkenness was no defense. The court sustained the objection.

Where the cause was submitted to the jury, the defendant's counsel requested the court to give them certain instructions. The court charged as requested except in one particular.

At the request of the district attorney the court told the jury that "drunkenness is no excuse for crime of the kind charged in the indictment." Before the court thus instructed the jury the defendant's counsel objected that it was calculated to mislead, unless qualified, but the court refused to qualify it in any respect.

No exception was taken on the part of the defendant to these decisions of the court at the time they were made. It

was too late to object thereto for the first time on the motion for a new trial. Under these circumstances we are not at liberty to review these rulings of the court on appeal.

Judgment affirmed.

We concur: Shafter, J.; Sawyer, J.; Sanderson, C. J.

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GEORGE W. McDERMOTT, Respondent, v. RICHARD M. APGAR, Appellant.

No. 306; July 11, 1864.

**Execution.—The Undivided Share of One Cutting Hay on Shares** cannot be levied upon to satisfy the debt of his cosharer.

**Sale—No Change of Possession—Creditors.**—To make a valid sale, as against creditors of the seller, it is necessary under the statute of frauds that there shall be an immediate and continued change of possession. If the buyer allows the seller to have the goods in his keeping after the sale and perform acts as to them and upon them consistent only with ownership, a levy upon them for the seller's debt will be sustained.

This was an action of claim and delivery. The defendant was a constable, and had levied upon forty-five tons of hay, on the farm of one Daniel Griffin, in execution of two judgments against Griffin. The hay, although on Griffin's farm, was the property of McDermott under a verbal agreement, as to which McDermott testified: "Griffin and I had an agreement to cut his field of grass and put it into shocks for a share, one-half; I to furnish machine and men. I received one-half of the hay." Being asked, however, "Did you take any away?" he answered, "No, sir, Mr. Wheaton and the constable took it away from me." The other material facts are disclosed by the court's opinion.

Whitman & Wells for respondent; M. A. Wheaton for appellant.

SAWYER, J.—Under the agreement to cut the hay on shares, plaintiff became a tenant in common with Griffin to the

extent of one-half. Upon this point the rights of the parties are governed by the principles determined in Bours v. Webster, 6 Cal. 661, Visher v. Webster, 13 Cal. 58, and Bernal v. Hovious, 17 Cal. 545, 79 Am. Dec. 147. This undivided half was not subject to seizure and sale on execution against Griffin.

The sale of Griffin's half to the plaintiff did not take place till after the hay was cut and thereby severed from the realty. To make a valid sale as against creditors, it was necessary under the statute of frauds that there should be an immediate and continued change of possession. After the hay was cut, it was gathered and pressed by three or four men hired and paid by plaintiff, one of whom was Griffin. The other men in gathering and pressing the hay, worked under Griffin's immediate direction—Griffin acting as a sort of overseer for plaintiff. The hay was cut, pressed and stacked on Griffin's land—and pressed in Griffin's press. The hands were boarded on the farm by Griffin. Sometimes plaintiff's horse and sometimes Griffin's was used on the press. The plaintiff was at work cutting grain in another place, and was only occasionally at the place where Griffin and the hands were engaged in pressing the hay. At the time the levy was made by defendant under an execution against Griffin, Griffin was actually engaged superintending the pressing of the hay, in his own press, on his own land, and working his own horse. The plaintiff only cut the hay with the machine and left it in the swarth upon the field, after which it was gathered and pressed by the hands who worked under the immediate superintendence of Griffin. These facts clearly appear from the testimony in which there is not the slightest conflict, and most of the testimony is from the plaintiff himself.

Upon this state of facts there was no such delivery as would take the case out of the statute of frauds. To all appearance Griffin was in the possession and controlling it. It was upon his land. He boarded and superintended the hands who were gathering and pressing it, using his own horse and press in the work. Apparently he controlled the hay and sustained to it the usual relation of owner to property. The sale of his half to plaintiff was therefore void as to the creditors of Grif-

fin, and was subject to seizure and sale on execution against him. In this respect the verdict was contrary to the evidence.

The judgment is reversed and a new trial ordered.

We concur: Sanderson, C. J.; Currey, J.; Shafter, J.

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ELMIRA GANN, Respondent, v. M. H. BOND, Appellant.

No. 3889; August 15, 1864.

**Tender—United States Legal Tender Act.**—A tender of money under the United States Legal Tender Act of February 25, 1862, is good in this state.

APPEAL from Fifth Judicial District, San Joaquin County.

Terry & Barrie for respondent; Budd Carr & Caldwell for appellant.

CURREY, J.—This is an appeal from a judgment in favor of the plaintiff against the defendant for a certain sum of money and the costs of the action. Whether or not this judgment can stand is to be determined upon the act of Congress passed on the 25th of February, 1862, entitled, "An act to authorize the issue of United States notes, and for the redemption and funding thereof, and for funding the floating debt of the United States," making such United States notes lawful money and a legal tender in the payment of all debts, public and private, within the United States, except as in said act is excepted. We have already passed upon the question which is involved in this action, in the case of Lick v. Faulkner, affirming the validity of that act.

The court below in effect decided the act of Congress, in the respect referred to, to be invalid and void. In this the court erred and the judgment must be reversed and the cause remanded with directions to the district court to enter a judgment for the plaintiff against the defendant for the sum tendered by the defendant to the plaintiff; and a judgment in

favor of the defendant against the plaintiff for his costs in this action, and it is so ordered and adjudged.

We concur: Rhodes, J.; Sanderson, C. J.; Sawyer, J.; Shafter, J.

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JOHN PETREE, Respondent, v. WILLIAM HARRIS, Appellant.

No. 4099; August 15, 1864.

**Appeal—Sufficiency of Evidence to Support Findings.**—Where the testimony at the trial was amply sufficient to sustain the findings, the judgment is not to be disturbed.

APPEAL from Sixth Judicial District, Sacramento County.

In a loan transaction Petree gave one William Yule his note for three hundred dollars, dated November 26, 1859, and payable to Yule's order six months after date, with interest at three per cent per month and to be compounded. The note was secured by mortgage on real estate. On the 1st of November, 1861, an accounting between the parties revealed four hundred and fifty dollars as due on the note, and this amount Petree would have had run on therefrom as principal, provided Yule would take two per cent per month interest instead of three. Yule declined, but Harris, who now comes into the transaction, was willing to loan money at two per cent, and so had Yule assign the note and mortgage to him. On the 31st of January, 1863, there was due on the note four hundred and fifty-nine dollars, and Petree, in his complaint, alleged that he then tendered to Harris that amount, and one dollar in addition to defray the expense of satisfying the mortgage; but Harris rejected the tender. The same tender was made on the 2d of May following and again was rejected. Petree then began suit to compel Harris to satisfy the mortgage, and Harris began a counter-suit for nine hundred and forty dollars and for a foreclosure, and attorneys' fees therein Numerous receipts in writing for installments of interest at two per cent paid in full were produced by the plaintiff at the

trial, but evidence on the part of Harris was to the point of there being an understanding that the reduction of interest was to depend upon promptness in payment as the installments became due.

D. W. Welty for respondent; George Cadwalader for appellant.

SAWYER, J.—There was no parol agreement to reduce interest on an existing debt, as claimed by the appellant. The court finds as facts that the transaction was a loan of money from Harris to Petree upon interest at two per cent per month—that instead of taking a new note and mortgage, Harris, with the assent of Petree, as security for the loan, took an assignment of the note and mortgage to Yule, which Petree desired to take up with the borrowed money. And the testimony is amply sufficient to sustain the findings. The allegations of the complaint of Petree in one case, and the affirmative matter set up in Petree's answer in the other, present the issues upon which the court made its findings.

As to the issue upon the amount tendered by Petree to Harris, the testimony was conflicting and we cannot disturb the finding. But on this issue, also, the finding seems to us to be supported by a preponderance of testimony.

The validity of the act of Congress making treasury notes a legal tender has already been upheld in the case of Lick v. Faulkner [25 Cal. 404], and other cases at the present term.

Finding no error in the record, the judgment is affirmed.

We concur: Sanderson, C. J.; Shafter, J.; Currey, J.; Rhodes, J.

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## S. R. ELLSWORTH, Respondent, v. C. W. O. MIDDLETON, Appellant.

No. 4035; September 5, 1864.

**Appeal—Objections to Testimony not Made Below.**—Objections to evidence as not being admissible under the allegations of the complaint cannot be raised for the first time on appeal.

**Appeal—Rulings on Evidence—Presumption of Correctness.**—The presumption is that the trial court ruled correctly on evidence when the evidence itself is not before the court appealed to.

APPEAL from Butte County.

Claim and delivery.

Lott & Lewis for respondent; H. K. Mitchell and F. L. Hatch for appellant.

SAWYER, J.—The plaintiff served on defendant the affidavit, notice and demand in all respects as prescribed in the one hundred and ninth section of the Practice Act, and was therefore in a position to maintain this action. It is insisted that the plaintiff cannot recover because the complaint does not allege the demand, and the plaintiff was not entitled to prove it under the pleadings. But the evidence was introduced without objection, and fully supports the finding on the question of demand. If the allegations of the complaint were not sufficient to authorize the introduction of the evidence on this point, defendant should have objected to its admission on the trial. It is too late to raise the question for the first time in this court. The complaint alleges the wrongful taking and is sufficient on its face. The defendant in his answer justifies by alleging title in Mitchell, and that he took the property as sheriff in an action pending between Mitchell and Morris and Dibble, and the replication avers the serving of the affidavit and demand under the one hundred and ninth section, thus presenting the issue. The testimony was introduced without objection, and the court found for the plaintiff. The action was tried on the theory that the demand was properly in issue, but whether correctly or not, the defendant will not be permitted to make the objection for the first time in this court.

Mayben does not appear to have been interested in the result of the suit at the time he was examined as a witness. He was therefore not incompetent on that ground.

Appellants allege error in excluding the record of the proceedings in insolvency in the case of Evans v. His Creditors. One of the grounds upon which the record was excluded was the illegality and invalidity of those proceedings. Those proceedings are not in the record, and we have no means of determining whether they were valid or not. The presumption is that the ruling of the judge in this respect was correct,

and we cannot disturb the judgment for this reason. It is pretty evident, however, that they were inadmissible on other grounds also.

These are the only points discussed in the appellant's brief, although a number of minor errors are specified in a paper called an assignment of errors on file, which do not require notice.

Judgment affirmed.

We concur: Rhodes, J.; Sanderson, C. J.; Currey, J.; Shafter, J.

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A. W. BLACK, Respondent, v. B. F. GOODIN et al., Appellants.

No. 404; September 5, 1864.

**Appeal—Manner of Preparing—Indifference to Statute.**—In order to have the court consider an appeal the appellant must bring it agreeably to the one hundred and ninety-fifth section of the Practice Act; gross irregularities in the manner of bringing the case up cannot be overlooked.

A. W. Thompson for respondent; C. W. Langdon for appellants.

SANDERSON, C. J.—This is an appeal from an order refusing a new trial. The motion seems to have been made upon something supposed to be a statement, but the record contains nothing which we can regard as such. There is nothing which purports to be a statement, nor is there anything agreed to by the parties, or settled by the judge, or certified to be correct as such by either. By examining the record and consulting the one hundred and ninety-fifth section of the Practice Act, counsel for appellants will readily perceive that the record in no respect complies with the statute.

Judgment affirmed.

We concur: Sawyer, J.; Currey, J.; Shafter, J.; Rhodes, J.

MARY WILLSON, Appellant, v. JOHN TRUEBODY et al., Respondents.

No. 205; September 5, 1864.

**Appeal—Objection for First Time on Appeal.—The Admission in Evidence** of a record which the plaintiff relied on to meet averments in the answer and ought, therefore, to have pleaded by way of replication, which he had failed to do, cannot be objected to for the first time on appeal.

APPEAL from Twelfth Judicial District, San Francisco County.

Allen T. Willson for appellant; Sloan, Morrell, Clement & White for respondents.

SHAFTER, J.—Ejectment for a lot of land on the corner of Washington street and Dunbar's alley in the city of San Francisco. There is but one point raised by the record which we deem it necessary to consider.

On the 15th of May, 1851, the respondent Truebody filed a bill in the superior court of the city of San Francisco against Allen T. Willson, F. M. Jacobson, Jeremiah Clark, Harvey Sparks and one Guzman, touching the title of the land now in controversy; the defendants Clark, Willson and Sparks answered the bill. The case was tried on the seventeenth day of September, 1851, and thereafter, on the 19th of December, 1851, a decree was entered in favor of the defendants, from which Truebody appealed. The late supreme court at the July term, 1852, reversed the judgment and "ordered adjudged and decreed that the entire legal and equitable title to the lot of ground and premises described in said complaint, was the property of Truebody," and further "ordered adjudged and decreed that the possession of the said lot of land be delivered up to said complainant, and that a writ of possession be awarded, and the same is hereby ordered to be issued, in favor of the plaintiff by the court below, directed to the sheriff of the county of San Francisco, commanding him to place the plaintiff in the possession of the entire lot of land as above described in this decree." This judgment

was duly certified to the superior court, and on the 9th of September, 1852, a writ of restitution issued, and on the next day Willson surrendered the possession of the premises to Truebody. The plaintiff in this action claims title to the premises by a deed executed to her by A. T. Willson bearing date October 29, 1851, and the foregoing decree is pleaded in bar.

For the purpose of meeting this defense, the plaintiff proved, as the case finds, that on the nineteenth day of July, 1851, A. T. Willson brought an action against Truebody alleging that he, Willson, was the owner of the land in controversy, and was in possession thereof by his tenant—that the defendant falsely claimed an estate therein adverse to the plaintiff, and prayed for judgment quieting his title. The defendant Truebody appeared, and thereafter such proceedings were had that on the 11th of February, 1852, it was "ordered, adjudged and decreed that the said John Truebody has no estate nor interest in, nor lien nor encumbrance on the lot of land described in the complaint." No appeal was taken from this judgment, and it is now in full force.

It is not denied by the counsel of the respondent that this judgment, in itself considered, completely defeats the legal effect of the judgment pleaded in bar; the only point made is that the plaintiff is not entitled to the benefit of the judgment for the reason that it was not brought forward by way of replication to the plea.

It is a sufficient answer to this objection, that no question was made upon the admissibility of the record at the trial: Jackson v. Feather River and Gibsonville W. Co., 14 Cal. 21; Seaward v. Malotte, 15 Cal. 307; Rabe v. Wells, 3 Cal. 151; White v. Abernethy, 3 Cal. 426.

Judgment reversed and new trial ordered.

We concur: Rhodes, J.; Sawyer, J.; Currey, J.; Sanderson, C. J.

HOWARD CHAPMAN et al., Respondents, v. FRANCIS F. WADE et al., Appellants.

No. 307; September 5, 1864.

**Appeal—Absence of Briefs—Withdrawal of Transcript.**—No brief having been filed, although fifty days had been allowed therefor after submission of the case, and the transcript having been withdrawn by one of the parties, the court is justified in affirming the judgment without considering the appeal.

APPEAL from Twelfth Judicial District, San Francisco County.

Hogel & Wilson for respondents; N. Compton for appellants.

CURREY, J.—This case was submitted on the 16th of April last, when twenty days was allowed to the appellant in which to prepare and file his brief. The same length of time was given to the respondent to prepare and file his brief in answer to that of the appellant, and ten days was allowed to the appellant to reply. Thus fifty days in the aggregate were allowed to the parties and no brief has been filed in this court on behalf of either of the parties.

We have not the transcript of the record before us, it having been withdrawn from the files of the court by one of the parties.

Under the circumstances the judgment is affirmed.

We concur: Sanderson, C. J.; Shafter, J.; Rhodes, J.; Sawyer, J.

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PEOPLE ex rel. A. B. SCOTT, Respondents, v. FANNON, Appellant.

No. 397; October 7, 1864.

**Appeal—Undertaking.—Upon Exceptions being Duly Served on** the appellant by the respondent to the sufficiency of the sureties executing the undertaking filed with the notice of appeal, it is not sufficient that the respondent be notified that the sureties will justify within two days thereafter, when the notice does not specify the officer before whom or the time of the day at which the sureties are to justify.

**Appeal—Insufficiency of Undertaking.**—The Act of 1861 (Laws of 1861, p. 589) prescribes the course to be pursued by appellants in order to avoid a dismissal for insufficiency of an undertaking on appeal, and an application to that end not in accordance with the statute will not be granted.

APPEAL from Fourteenth Judicial District, Placer County.

McCullough, Tuttle & Fellows for respondent; Jo. Hamilton for appellant.

CURREY, J.—The notice of appeal in this case was filed and a copy thereof duly served on the 3d of May, 1864. On the same day an undertaking on appeal was also filed, and on the 7th of the same month respondent's attorneys served on appellant's attorney notice that they excepted to the sufficiency of the sureties who executed the undertaking. On the day last mentioned the appellant's attorney filed in the cause a notice that the sureties would appear on the 9th of May at the office of the clerk of the court to justify as sureties. Accompanying this notice was a statement by appellant's attorney that a copy of it had been left with the respondent's attorneys on the day of the date of the notice. The sureties appeared before the clerk on the 9th and justified, but no one appeared there on the part of the respondent. The counsel for the respondent upon notice has moved for the dismissal of the appeal on the ground that no notice was given of the justification of the sureties, to whose sufficiency the respondent excepted.

The three hundred and forty-eighth section of the Practice Act provides that an undertaking with sureties shall be filed or deposit of money made in order to render an appeal effectual for any purpose, and the time within which the filing of the undertaking or the deposit shall be made. The three hundred and fifty-fifth section of the same act provides that the undertaking shall be of no effect, unless accompanied by an affidavit of the sureties as to their property qualifications. It also provides that the respondent may except to the sufficiency of the sureties within five days after the filing of the undertaking; and "unless they or other sureties justify before a judge of the court below, or a county judge, or the county

clerk, within five days thereafter, upon notice to the adverse party, to the amount stated in their affidavits, the appeal shall be regarded as if no such undertaking had been given." In this case there is no evidence of any notice to the respondent of the justification of the sureties, and beyond this the paper purporting to be a notice filed by the appellant on the seventh day of May does not specify before whom the justification would be made or at what hour of the day. Under these circumstances we can only regard the appeal as if no undertaking had been given.

The appellant asks to be permitted to prepare a new undertaking to be approved and filed before the hearing of the cause in its order on the calendar. The act of 1861 (Laws 1861, p. 589) prescribes the course to be pursued by appellants in order to avoid a dismissal of an appeal for insufficiency of the undertaking thereon. The appellant's application is not authorized by this act and cannot be granted.

The motion to dismiss the appeal must be granted and it is so ordered.

We concur: Rhodes, J.; Sanderson, C. J.; Shafter, J.; Sawyer, J.

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T. H. HAWKINS, Respondent, v. C. A. HANCOCK et al., Appellants.

No. 228; December 6, 1864.

**Ejectment—Claim Through One Who has Abandoned Premises.** In ejectment the defense must show something more than a deed —of premises not really including those in suit—from one who had abandoned possession two years before the plaintiff's entry.

APPEAL from Tenth Judicial District, Sierra County.

C. Haymond for respondent; Williams & Johnson for appellants.

SHAFTER, J.—The court, on evidence which we deem sufficient, found all the facts necessary to vest a good possessory title in the plaintiff to the lot sued for; and further

found the ouster and unlawful withholding complained of. The defendants claimed under a prior entry by Palmer. But Palmer's deed to Hancock did not, as the court very properly held, include the premises demanded; and furthermore the record shows that, if Palmer once had possession of the lot, he and his associate Stickney both abandoned it two years at least prior to the plaintiff's entry. The objection that the court did not pass on all the issues is not well founded. They are all responded to in effect in the findings.

Judgment affirmed.

We concur: Sanderson, C. J.; Sawyer, J.; Rhodes, J.; Currey, J.

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G. H. KELLOGG, Appellant, v. J. D. CRIPPEN et al., Respondents.

No. 4046; December 26, 1864.

**Appeal—Substantial Conflict of Evidence.—A Judgment Following** a verdict found upon a substantial conflict of evidence will not be disturbed.

**Witness—Competency.—The Interest of a Deputy Sheriff** in the outcome of an action against the sheriff and his sureties is not such that he may not be a witness for the defendants on producing a release signed by the sheriff.

**Appeal—Overruling Objections to Testimony.**—An appeal from the overruling of an objection to testimony must show on what grounds the objection was based, whether the court ruled on it, and, if it did rule, that an exception was taken to the ruling.

APPEAL from Thirteenth Judicial District, Mariposa County.

Eugene Casserly for appellant; Merritt, Deering & McCullough for respondents.

SHAFTER, J.—This is an action brought on the official bond of defendant Crippen, given by him as sheriff of the county of Mariposa. The other defendants are his sureties. The breaches assigned are neglect on the part of Crippen to sell certain personal property, on an execution in his hands, which execution, as the complaint alleges, was issued upon a

judgment rendered in favor of one Knox against the Merced Falls Mining Company, and which judgment, on or about the 11th of February, 1862, came to the plaintiff by assignment from Knox; and making a false return upon the execution that he had on the 8th of February, 1862, three days before the assignment of the judgment to the plaintiff, sold the aforesaid personal property, at public outcry, to Knox, the original creditor on the execution. The complaint further avers that plaintiff notified Crippen on the 26th of February, 1862, that the judgment had been assigned to him. The alleged neglect to sell in pursuance of the plaintiff's instructions as assignee, as well as the alleged false return of Crippen that he had sold before the date of the assignment under which plaintiff claims, constitute the gravamen of this action.

The answer denies the alleged falsity of the return, and meets the charge of neglect to obey the plaintiff's instructions by an averment that before those instructions were given, and three days before the assignment of the judgment to plaintiff was made, he, Crippen, had in the regular discharge of his duty, sold the property at public vendue to Knox, the then owner of the judgment. The answer not only alleges that the property was struck off to Knox as the highest bidder, but also that the sale was consummated at the time by a delivery of the property to him, and that he subsequently exercised acts of ownership with respect to it. The trial was by jury, and the appeal is from the judgment and also from an order overruling plaintiff's motion for a new trial.

The issue as joined upon the record involves nothing, in effect, but the truth of the return, and the contest at the trial appears to have been confined to the following points of inquiry: First. Did Knox bid at the sale of February 8th as "Agent" or in his own name? Second. If he bid as "Agent," was not his bid in fact on his own behalf? Third. If he bid in his own name, or if bidding as "Agent" he in fact bid on his own behalf, was the sale consummated by a delivery? The foregoing is a statement of the points of which testimony was taken, though perhaps it would not be an entirely just analysis of the matters really involved in the issue as made in the pleadings. The three questions, however, to which the testimony was in fact directed, were pure questions of fact. The testimony as set forth in the statement was con-

flicting, and under the frequent and uniform decisions of the late supreme court, in the entire correctness of which this court has already in a number of instances had occasion to express its entire acquiescence, we cannot go behind the verdict of the jury.

On the trial, Davis, under sheriff, was called as a witness for the defense. The plaintiff objected to his competency on the ground of interest in the event of the suit. A release was produced, to which no objection was interposed by the plaintiff's counsel, except that it was signed by Crippen alone. Assuming that the objection to the competency of the witness was well taken, we have no doubt as to the power of Crippen to release him. There were no relations between the witness and the sureties on Crippen's bond. Davis was not a party to the action; he had not signed the bond as a cosurety; and if a judgment had been rendered against the defendants, and it had been paid by the sureties, their redress would have been confined to Crippen, to whose official obligations their own undertaking was collateral.

On the cross-examination of Davis, plaintiff's counsel drew from the witness a statement to the effect that he, the witness, subsequent to the sale on the 8th of February, had the property sold at that date in his possession by virtue of an execution issued in Goodman v. Knox et al. It would seem that immediately after this statement was made, the counsel of the defendants gave the judgment and execution in that case in evidence "under objection of plaintiff," and error is now assigned upon the introduction of those documents. The answers to this alleged error are multiplied and apparent. It does not appear that the ground of the objection was either stated or suggested. It does not appear that the court ruled on the objection. Assuming, however, that the court did rule upon it, it does not appear that any exception was taken to the ruling. It may be added that the plaintiff himself proved all the facts on cross-examination, to which he now objects as irrelevant. The documentary evidence put in by defendants was merely corroborative of the parol testimony previously adduced by the plaintiff.

Judgment affirmed.

We concur: Sawyer, J.; Sanderson, C. J.; Currey, J.; Rhodes, J.

## S. K. THOMAS, Appellant, v. HIS CREDITORS, Respondents.

No. 3925; January 4, 1865.

**Pleading.—A Demurrer to a Complaint That is Good in Part** should not be sustained, a cause of action being shown by such part irrespective of others that may be bad.

**Insolvents—Schedule—Alleged Fraud—Burden of Proof.—On** an issue of fraud the question whether property described in the schedule of an insolvent as "interest in land bought of ———" was not intended by such insolvent to indicate "The ——— tract," the names being identical, the burden is on the party asserting the fraud.

APPEAL from Fifteenth Judicial District, Butte County.

Jos. E. N. Lewis for appellant; Harris & Berry for respondents.

SHAFTER, J.—The demurrer of the appellant to the opposition of his creditors was properly overruled. Various acts of fraud were set forth, and should it be admitted that some of them were imperfectly stated, still there are others that are well stated and the demurrer cannot stand for the reason that it is not good to the whole extent of it.

The document designated in the record as "paper A" was introduced for the purpose of proving the averment in the opposition that the appellant was interested in a certain piece of land called in the paper the "Dorland tract" and not contained in his schedule of assets. Standing by itself, the document merely tended to prove that Thomas, at its date, had an interest in the tract named therein. In the list of assets annexed to the petition in insolvency, the following item occurs: "Interest in the land bought of James Dorland." In the absence of other proof, the intendment would be that the land so described in the schedule, was identical with the "Dorland tract" of paper A. The burden of proving that the two were not identical was upon the creditors, and we do not consider that they made out a case for the jury on that point by the mere force of the paper. If, in an action of ejectment, the plaintiff in proving up his title should give in evidence a deed

from A to B, followed by a deed from B to C, the intendment would be that the grantee in the one deed and the grantor in the other were one and the same person. The court in this case erred in submitting the point of identity to the jury as an open question of fact to be passed upon by them at discretion; and the error was repeated when the court at the plaintiff's request refused to instruct the jury that the land described in the deed from James Dorland to him, given in evidence by the respondents, was (prima facie) the land described in the schedule.

Judgment reversed and new trial ordered.

We concur: Sanderson, C. J.; Sawyer, J.; Rhodes, J.; Currey, J.

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THOMAS E. KIMBALL, Appellant, v. AMOS WILBER et al., Respondents.

THOMAS E. KIMBALL, Appellant, v. W. RAUGHT et al., Respondents.

No. 380; January 4, 1865.

**Appeal.—Where Manifestly the Judgment is Correct, even conceding error where alleged as made in course of the trial, it should not be disturbed.**

APPEAL from Sixth Judicial District, Sacramento County.

E. D. Semple for appellant.

SHAFTER, J.—The title of the plaintiff to the wood sued for in these actions, respectively, depends upon the title of Thayer (plaintiff's vendor) to the land upon which the wood was cut. The claim of Thayer to said lands was based upon a deed by Missroon to Coghill dated April 22, 1852, and a deed by Larkin to Whitcomb dated July 23, 1852. The southeast corner of the "Rancho of Larkins Children" is found in the

report of the referee, and under the construction put by us upon both the deeds referred to in Kimball v. Semple (July term, 1864) the lands named are not included in either of those deeds. It appearing that the plaintiff is not prejudiced by the errors complained of, and that the judgment is right as it stands, it is unnecessary to pass upon the alleged errors: Thompson v. Lyon, 14 Cal. 42; Johnson v. Sepulbeba, 5 Cal. 151; Grimes v. Fall, 15 Cal. 63; Tohler v. Folsom, 1 Cal. 213; Smith v. Compton, 6 Cal. 26; Sunol v. Hepburn, 1 Cal. 285; Hopkins v. Grinnell, 28 Barb. (N. Y.) 533; Belmont v. Coleman, 1 Bosw. (N. Y.) 188.

Judgment affirmed.

We concur: Sanderson, C. J.; Sawyer, J.; Rhodes, J.; Currey, J.

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## P. A. LAMPING & CO., Respondents, v. RED STAR CO., Appellants.

No. 421; January 5, 1865.

**Judgment—Relief in Excess of Demand in Complaint.**—A judgment may not be given for relief beyond that demanded in the complaint or for a sum in excess of the sum demanded.

**Judgment—Relief in Excess of Demand—Modification on Appeal.**—On its being shown that a judgment by default has been taken for a sum greater than that asked for in the complaint and against more and other persons than named in the summons and complaint, and that the demand in the summons was beyond that in the complaint, the court on appeal may order the plaintiffs to file their written consent to a modification of the judgment within a time named, in default of which consent the judgment must be reversed.

**Costs.—In Disposing of an Appeal from a Default Judgment,** given against other than parties named in the complaint, for a sum beyond that demanded in the complaint, and in a case where the sums mentioned in the summons and in the complaint differed in amount, the defendants are to be awarded costs.

APPEAL from Tenth Judicial District, Sierra County.

Van Cliet & Bowers for respondents; Williams & Johnson for appellants.

SAWYER, J.—As suggested by respondent's counsel, there is no statement in the record that can be considered. But, on the other hand, none is required, for the errors appearing in the judgment-roll, brief as it is, are manifest and manifold. There is no congruity between any two of the documents constituting the judgment-roll.

The summons, in stating the relief demanded, goes beyond the prayer of the complaint; the officer's return shows a service on parties not mentioned in the complaint or summons, either by real or fictitious names; the judgment is against all the parties served, and, as to the relief granted, goes even beyond the relief stated in the summons to be demanded, and exceeds that which the contract sued on would authorize, even had it been embraced within the terms of the prayer of the complaint, or the summons.

The judgment is by default, and the court was, therefore, not authorized to grant any greater relief than is demanded in the prayer of the complaint and specified in the summons: Practice Act, 147; Raun v. Reynolds, 11 Cal. 19; Gage v. Rogers, 20 Cal. 91; Lattimer v. Ryan, 20 Cal. 628.

The prayer is that plaintiffs "may have judgment against said defendants for the full sum due on said note, for principal and interest, which is five thousand three hundred and five dollars." This was the full amount, principal and interest, due on the day the complaint was filed, August 15, 1863. It is a prayer for the specific sum named and no more. There is no prayer for interest to accrue from that time forth, and no rate of interest specified in the summons for which judgment could be taken. Had there been a prayer for "interest" without specifying the rate in the prayer or summons, the court would not even then have been authorized to enter judgment for a rate greater than ten per cent per annum: Lattimer v. Ryan, 20 Cal. 633. But the judgment is for "five thousand three hundred and five dollars and interest on said sum at three per cent per month, from the 20th day of May A. D. 1863 until paid." May 20, 1863, is the date of the note. Yet the interest from May 20th to August 15th, the day when the suit was commenced, had already been added to the principal and formed a part of the said sum of five thousand three hundred and five dollars. So that the judgment calls for interest on the principal sum twice during the period between those

dates, and interest on the interest during the same time in addition, as well as interest on the whole sum at three per cent per month for the future till paid. The judgment is erroneous as to the entire amount exceeding five thousand three hundred and five dollars, and the costs.

The judgment is "to be enforced and collected in gold coin." In this respect, also, the judgment exceeds the relief prayed for. The prayer is simply for so much money, without specifying the kind of money. Nor does the summons say that judgment will be taken in gold coin.

In this respect, also, the relief exceeds that authorized by the contract, for there is no promise in the note to pay in gold coin. The instrument is a very wordy one, and perhaps the payees supposed they had obtained a contract to pay in gold coin, but such is not the case, and the contract does not support the judgment under section 200 of the Practice Act.

The record furnishes the data for correcting the judgment, and if the respondents desire it, the judgment may be modified so as to be entered for the sum of five thousand three hundred and five dollars only and costs of the court below against such defendants as are mentioned in the complaint.

It is therefore ordered that the respondents have fifteen days in which to file their written consent that the judgment be modified in accordance with the views expressed in this opinion, and upon filing such written consent it is ordered that the judgment be modified in pursuance thereof. In default of filing such written consent it is ordered that a judgment be entered reversing the judgment of the court below and remanding the cause for further proceedings.

It is further ordered that the appellants recover their costs of appeal.

We concur: Sanderson, C. J.; Shafter, J.; Currey, J.; Rhodes, J.

January 18, 1865.

The respondents having filed a stipulation consenting to a modification of the judgment in pursuance of the order heretofore entered in this cause, it is ordered that the district court be and it is hereby directed to modify its judgment in accordance with the direction contained in the opnion herein filed, and that judgment be entered against the defendants named

in the complaint for the sum of five thousand three hundred and five dollars and the costs accrued in the court below, and that appellants recover their costs of appeal.

Sawyer, J.
Sanderson, C. J.
Rhodes, J.
Currey, J.

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JOHN QUINN, Respondent, v. BRENNUS KENYON et al., Appellants.

No. 4180; January 11, 1865.

**Forcible Entry and Detainer—Improper Evidence—Instructions.** In forcible entry and detainer the admission in evidence of an irrelevant record affecting title is not reversible error if subsequently the court so instructs the jury as substantially to withdraw the record from their consideration.

**Instructions—Adding Explanations.—It is not Necessarily Error** for the court to add to an instruction, given at the request of a party, an explanation of its own.

APPEAL from Fifth Judicial District, San Joaquin County.

J. B. Hall and J. A. Booker for respondent; Budd, Carr & Byers for appellants.

SAWYER, J.—In this case the defendants did not state upon what particular exceptions among those scattered through the record they intended to rely, and for this reason the statement does not conform to the requirements of the statute as expounded in Hutton v. Reed. If parties would at the commencement or conclusion of their statement collect together the errors relied on, and say substantially that the party will, on motion for new trial, rely on the following errors, 1st, 2d, 3d, etc., particularly specifying the precise errors upon which they intend to rely, there could be no misapprehension in regard to the matter.

But as the appeal was taken before the decision in Hutton v. Reed, we will notice such exceptions as appear in the record, however loosely stated.

The record in Quinn v. Moore, in which case the writ of assistance was issued under which Quinn was put in possession, was irrelevant and should not have been admitted. But the court instructed the jury substantially that the right of property was not in issue, and the case was submitted to them on the question of possession in plaintiff and a forcible entry by defendants. No injury, therefore, could have resulted from admitting the evidence, as this instruction substantially withdrew it from the consideration of the jury. The evidence in relation to a pre-emption claim on the part of defendants was properly rejected. The fifth instruction asked by defendants, in view of the fourth instruction asked and given, was irrelevant and properly refused.

The verbal explanation given in connection with the third and fourth instructions given at request of the defendants, in view of the circumstances of the case as shown by the evidence, was not, we think, erroneous.

We are satisfied that justice has been done between the parties and see no error of sufficient importance to justify a reversal of the judgment.

Judgment affirmed.

We concur: Currey, J.; Shafter, J.; Rhodes, J.

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## ARTHUR THORNTON, Respondent, v. JOHN THOMPSON, Appellant.

No. 466; January 11, 1865.

**New Trial—Denial of Continuance—Affidavits.**—Where a refusal of a continuance, asked on the ground of the absence of a material witness, is made the basis of a motion for a new trial, an affidavit of such witness must be produced, if obtainable, and if it is not obtainable this should be shown.

**Continuance—Discretion of Court.**—**The Granting of a Continuance** is a matter largely within the discretion of the trial court.

**Trial—Notice of Jury.**—**By Failure to File,** within six days of the beginning of the term, a notice that a jury will be required a party waives a jury.

APPEAL from Fifth Judicial District, San Joaquin County.

Action to recover possession of real property.

Budd & Carr and Tyler & Cobb for respondent; T. A. Caldwell, J. G. Jenkins and Geo. Cadwalader for appellant.

SAWYER, J.—In a case where an application for continuance on the ground of the absence of a witness has been refused, "the party whose application has been refused should move for a new trial, and support the application by the affidavit of the absent witness, if such affidavits can be obtained, or it should be shown to the court that they cannot be obtained. Unless this be done this court will not interfere, in civil cases, with the action of the lower court": Pilot Creek Canal Co. v. Chapman, 11 Cal. 162. The granting or refusing of a continuance rests very much in the discretion of the court, and its action in such cases will not be reviewed except in cases of manifest abuse of such discretion: Musgrove v. Perkins, 9 Cal. 211; Frank v. Brady, 8 Cal. 47. No such abuse of discretion is shown in this case. Nor was the affidavit of the absent witness procured, or the want of it accounted for on motion for new trial.

A jury was waived, under the statute, by a failure to file with the clerk six days before the commencement of the term a notice that a jury would be required: Laws 1863, p. 636, sec. 23. The case had been set down to be tried on the 7th by consent of parties, although it was known by the defendant at the time it was so set down that no jury had been summoned to be present at any time before the 9th, and it was manifestly understood by the parties that the case was to be tried by the court without a jury, until defendant failed to obtain a continuance, after which he demanded a jury. Doubtless it was for this reason that the court in its discretion enforced the statutory waiver.

There was no error in denying a nonsuit. The evidence was that the land had been fenced and occupied for a number of years—that the fence had been in part washed away by the floods, and that plaintiff had been for sometime before and down to the Saturday night previous to the entry complained of (which was on Monday) engaged in refencing. The evi-

dence of possession was sufficient under the circumstances, notwithstanding the reinclosure had not been completed. There was also evidence tending to show that the plaintiff while in possession was expelled by force, and that he received two wounds, one from a shot fired by defendant, and the other from a shot fired by defendant's son. There was no error in refusing a nonsuit at the close of defendant's testimony. Nor should we be justified in setting aside the finding as being contrary to the evidence.

Judgment and order affirmed.

We concur: Sanderson, C. J.; Rhodes, J.; Currey, J.; Shafter, J.

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## WILLIAM A. CORNWALL, Appellant, v. BURNING MOSCOW GOLD AND SILVER MINING CO., Respondent.

No. 480; January 13, 1865.

**Corporations—Would-be Stockholder.—A Person cannot Compel a corporation, without having some agreement with it to that effect, to accept him as a member, or to receive his interest in the mining ground and issue stock to him in return.**

APPEAL from Twelfth Judicial District, San Francisco County.

Shafter, Goold & Dwinelle and E. Cook for appellant; Eugene Lies for respondent.

SAWYER, J.—Plaintiff appeals from a judgment on demurrer. He sues to compel defendant, a mining corporation, to issue to him stock sufficient to represent one hundred running feet of the mine claimed by the defendant. It appears from the allegations of the complaint that the one hundred feet claimed by plaintiff has never been conveyed to the corporation, and that no agreement has ever been entered into between the defendant or those who organized the corporation, and any party having authority to deal with the one hundred feet in question, for a conveyance thereof to the company, or for the issue of stock by the company to the owner. Plaintiff

alleges that he has tendered a conveyance and demanded the stock. Plaintiff cannot compel a corporation, or any other company, without some agreement to that effect on its part, to accept him as a member, or to receive his interest in the mining ground, and issue stock therefor. If the corporation has taken possession of any of his mining ground without his authority, his remedy is by action to recover it.

There was no error in sustaining the demurrer.

Judgment affirmed.

We concur: Sanderson, C. J.; Rhodes, J.; Currey, J.; Shafter, J.

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## WILLIAM NEELY THOMPSON, Respondent, v. WILLIAM GIBB et al., Appellants.

No. 3675; January 21, 1865.

**Mines—Cotenancy or Partnership in Property.**—Under an instrument by which the lessee of a mine transfers for value a fractional interest in the latter and agrees to conduct the business of the mine for the transferee as well as himself, and be sole agent irrevocably for the transferee in all matters in that regard, the parties become, as to the mine, tenants in common of the leasehold estate and, as to the business, partners.

**Agency—Delegation of Duties.—The Agreement by the Manager** of an enterprise of great magnitude to be his cotenant's agent in that connection does not contemplate his devoting always his own personal service to the carrying out of the agency; he may delegate the performance of local services, since his own presence often may be needed elsewhere for the good of all.

**Partnership—Death of Partner—Dissolution.**—In the absence of an intention to the contrary expressed in the clearest and most unambiguous terms in the instrument establishing the relation of partners, the death of a partner dissolves the partnership, and the surviving partner becomes clothed with authority to close up the business.

**Injunction—Inconvenience of Person Restrained.—If a Tenant in Common** of land, the usufruct of which belongs to him and his cotenant jointly as partners or otherwise, wrongfully excludes the cotenant of all beneficial use of any share, he cannot complain that an injunction to restrain him in this connection interferes with his beneficial enjoyment of his own share.

APPEAL from Twelfth Judicial District, San Francisco County.

James Lake & Dwinelle for respondent; E. Casserly and B. S. Brooks for appellants.

A rehearing was granted June 5, 1865, but there is no record of any decision or opinion on rehearing.

CURRY, J.—The New Idria Mining Company by deed executed on the 28th of January, 1858, granted and leased to Daniel Gibb a tract of land in Fresno county in this state known as the New Idria Mine, containing therein a quicksilver mine, and also the appurtenances to the same belonging, for the term of ten years. Under this grant the lessee and his heirs and assigns were granted the privilege of working the mine and extracting therefrom quicksilver. On the 25th of August following Daniel Gibb and the plaintiff entered into an agreement in writing under seal by which the former assigned and conveyed to the latter one-third part or interest of the lease and the estate and property granted by the New Idria Mining Company to said Gibb. This assignment and conveyance was made upon certain terms and conditions therein expressed, as well as for a money consideration specified, and also contained therein certain reservations. It was provided that the plaintiff should be liable and responsible to Daniel Gibb for one-third of all the expenditures made by him before that date and which should be thereafter incurred in and incidental to the working of the mine, and also one-third of all expenditures and outlays made or to be made by Daniel Gibb as lessee of the mine and property, provided the same should be limited to fifty thousand dollars above the receipts and products arising from working the mine, unless the plaintiff consented in writing to a greater amount. It was also provided that Daniel Gibb should be, until the termination of the leasehold, the sole agent and attorney irrevocably of the plaintiff, and of the interest assigned and conveyed to him, in all matters and things in any way appertaining to or concerning the lease and the interest assigned and conveyed to the plaintiff, and that as such agent and attorney he should continue to work the mine and to manage the concerns thereof

and of the leasehold in the manner as to him might seem most to advance the interest of the parties concerned, but as such agent and attorney he should have no power to sell the interest so assigned and conveyed to the plaintiff. It was also provided that as such agent and attorney he should sell and dispose of the products of the mines and property leased, in this state or elsewhere, as he might deem proper, and should manage the affairs and business of the parties, charging and receiving therefor, over and above all the expenses of the management of the business, five per cent commissions on all sales of the products of the mine, and also five per cent commissions on all moneys disbursed in the working of the mine or in conducting the business of the same, and should also be allowed and paid, on all cash advances or outlays made by him on account of the business of the enterprise over and above the proceeds of sales, interest at the rate of two per cent per month payable half yearly, and for the due payment of the plaintiff's portion of all these outlays and expenditures made and liabilities incurred and which should be incurred and for the due payment of the commissions and interest specified, it was stipulated that said Gibb should have and hold a lien on the portion and interest assigned and conveyed to the plaintiff. It was also further provided that Gibb should keep all necessary and proper books and accounts of the transactions connected with the lease, or rendered necessary by the contract between the parties, and should, on demand, render to the plaintiff an account current or balance sheet of such transactions on the 31st of December and 30th of June of each year or as soon thereafter as the accounts could with reasonable diligence be prepared, during the term, when settlements should be made between the parties.

The parties to the contract entered into on the 25th of August, 1858, intended that it should have a retrospective operation so as to comprehend the prosecution of the mining enterprise from the time of Daniel Gibb's connection with it as lessee. This is apparent from the contents of the article of agreement entered into between them and also from their conduct in relation to the business subsequent to the date of this agreement. When this written assignment and transfer was executed Daniel Gibb was prosecuting the work of mining for quicksilver upon the leased premises, and thence onward until

July, 1861, continued the work, expending in the successful conduct of the business large sums of money, and during the same period extracted from the mine large quantities of quicksilver, which he disposed of in various markets of the world, receiving therefor large sums of money. During a part of the time the plaintiff was at the mine acting in the capacity of superintendent under and by the appointment of Daniel Gibb. As the enterprise developed and the product of quicksilver increased it became necessary to seek for markets where it could be disposed of for the benefit of those concerned, and to that end it was necessary to establish agencies abroad. In July, 1861, Daniel Gibb, who was a resident of this state, left here for Europe professedly for the purpose of establishing business connections or agencies there through which he might make sales of the products of the mine. Previous to this a short time a difference had arisen between the plaintiff and Daniel Gibb respecting their mining interests, and accounts connected therewith, and immediately before Gibb's departure for Europe the plaintiff by his attorneys addressed and delivered to him a letter protesting against his leaving the state while he remained agent of the mine and while his accounts remained unsettled, warning him that if he persisted in going abroad, it would compel the plaintiff to stop all mining operations until his rights might be determined. At this time the plaintiff claimed that there was over thirty thousand dollars due him on account of his interest in the proceeds of the mine, while on the part of Gibb it was claimed that the plaintiff was indebted to him on the mining enterprise account in a large sum, and in answer to the letter protesting against his leaving the state, he denied that plaintiff had any right to make any such objection, and then stated that the plaintiff had already been informed that one chief object which he had in visiting Europe was to arrange foreign agencies for the sale of the quicksilver product of the New Idria Mines, as well as to attend to other necessary business of such mines and the lease thereof, and advising him that he desired an early settlement with him, and had granted to his brother ample powers for the purpose, and further stating that he had made every necessary arrangement for the efficient conducting of the business of the mine in California during his absence attending to its more pressing and important interests. When the lease was

executed by the New Idria Mining Company to Daniel Gibb he was, with others, engaged in a large mercantile business in the city of San Francisco. The style of his firm was Daniel Gibb & Co. In the spring of 1861 this firm was dissolved, and a new firm formed, consisting of Daniel Gibb, Alexander Forbes and William Gibb. In the formation of this partnership it was contemplated to continue the house of Daniel Gibb & Co. at the city of San Francisco, under its former name and style and also to establish another house at Glasgow, in Scotland under the name and style of Forbes, Gibb & Co. As an inducement to Forbes to become a member of this firm, Daniel Gibb proposed and agreed with him and William Gibb, that while he, Daniel Gibb, worked the mine, he would consign to the new firm during its continuance, for realization on account of those concerned in the mine, all the quicksilver products of the same which should be received in San Francisco, after the 1st of June, 1861. This partnership was formed, and the firm established as proposed a mercantile house in Glasgow, under the name and style of Forbes, Gibb & Co. The house in Glasgow was established by Daniel Gibb after his departure from this state. There Daniel Gibb remained until the 17th of December, 1861, when he died. During his absence, the defendant William Gibb had the business of the mining interests of the parties in this state in charge, under a power of attorney from his brother Daniel Gibb.

By his last will and testament Daniel Gibb appointed the defendant William Gibb his executor, but before the will was offered to the court for probate, William Gibb was appointed the special administrator of the estate, and thereupon became qualified and entered upon the duties of his office. After this and in February, 1862, the plaintiff filed his verified bill of complaint in the district court of the twelfth judicial district against William Gibb, special administrator of the estate of Daniel Gibb, deceased, William Gibb in his own person, Alexander Forbes and William H. Richards. In his complaint the plaintiff sets forth the facts contained in the article of agreement entered into between Daniel Gibb and the plaintiff on the 25th of August, 1858. The plaintiff alleged that Daniel Gibb worked the mine under the contract entered into between the parties thereto to the time of his departure for Europe, and obtained therefrom large and valuable products, and a

large amount of profits from the sales of quicksilver, and that of the profits thirty thousand dollars belonged to the plaintiff, for which Daniel Gibb in his lifetime refused to account and pay over to him, on the pretense that the mining enterprise was indebted to him upon a balance struck between it and him, and that the defendants Forbes and William Gibb had combined and confederated with Daniel Gibb to defraud the plaintiff by withholding from him the share of the profits due him, that they might jointly and severally profit thereby. This is the substance of the charge made against the defendants Forbes and William Gibb. The defendant Richards is also charged with permitting himself to be used as an instrument by which the alleged fraudulent designs of the defendants were sought to be consummated. In support of the general charge made the plaintiff states that Daniel Gibb omitted to keep the necessary and proper books and accounts respecting the business of the mine; that the books kept by him were neither true nor correct; that they contained false and fabricated charges, and omitted proper credits; that they were kept in an artful, complicated and complex manner to the end that the true state of the accounts might not be ascertained. That at various times he pretended to furnish plaintiffs with accurate accounts, which were not so, but on the contrary contained charges of expenses never incurred, interest which never accrued, and commissions never earned, and omitted to make credits of the proceeds of the mine, and that this course of conduct was pursued to induce the plaintiff to believe the mining business was not making any money above its expenses, and that the plaintiff was largely in debt in the premises instead of being entitled to thirty thousand dollars of the net profits thereof.

In support of these specific allegations, the plaintiff and a bookkeeper who had examined the books made affidavits, with which copies of the books were submitted, showing that the same contained entries made at intervals of about six months, of the aggregate quantity of quicksilver sold during the specified interval, and stating the net proceeds of such sales. The gross proceeds of the sales were not stated nor the particular dates when sales were made, nor when payments were received thereon. The plaintiff also by his affidavit makes an exhibit of thirty-two shipments of quicksilver to foreign ports, con-

taining the dates of the respective invoices and the ports to which shipped. The dates of only four of these thirty-two shipments were set forth in the invoice-book, and only five of the accounts of sales rendered by Daniel Gibb contained dates, and between these and the entries thereof in the cash-book there is an average difference of a little over five months; and as to a portion of the remainder of these shipments it does not appear at what particular time or times the sales of the quicksilver shipped were effected, otherwise than by the entries in the cash-book, as at the last end of the six months covered by the particular account for that period; and respecting thirteen of the thirty-two shipments no dates of sales appear by the invoice-book, nor by the accounts rendered, nor by the cash-book.

The plaintiff deposed that from a careful examination of the books, and the accounts rendered him by Daniel Gibb, he could find no dates of amounts of sales rendered by the consignees of quicksilver except as indicated in the thirty-two shipments mentioned; and he also deposed that Daniel Gibb had never rendered him any of the original account sales received from such consignees, nor copies of the same except in a single instance, and that therefore he had been unable to verify the accounts rendered in respect to the large items of interest dependent thereon, or in respect to the item of exchange growing out of the differences of foreign currencies in which the proceeds of sales were realized. He also deposed that many of the entries in the cash-book purporting to be for cash advanced by Daniel Gibb were made when he was in funds from the proceeds of the mine; and he charges that the same entries were fictitious, and made to enable said Gibb to obtain interest on pretended advancements in fraud of the plaintiff's right in the premises. The plaintiff further deposed that Daniel Gibb had, during nearly the whole period of their connection in business, obtained advances on the shipments made of the quicksilver of the mine to foreign ports, and that except as to three shipments, no entries whatever of advances were made in the books until sometime in May, 1862, when after repeated complaints of the plaintiff, Daniel Gibb, by entries in the book called the journal, gave credit for what he stated to be all such advances, amounting in the aggregate to about one hundred and ninety thousand dollars; that the

books failed to show in what form such advances were received; but he states that Daniel Gibb informed him that the same were made in sterling bills, which were mostly used by him in his commercial business, in which the plaintiff had no interest; and the plaintiff charges that such sterling bills were worth to said Gibb, and realized to him much more than the sums for which he had given credit. The plaintiff then charges that, by suppressing these advances, Daniel Gibb intended to deprive him of the benefit of the same in the reduction of the interest account ostensibly accrued and accruing against plaintiff as well as to secure to himself the profits of the exchange realized from such sterling bills, which profits he says he verily believes amounted to four thousand dollars. He states that the interest account alone on such advances, as finally credited by Daniel Gibb on the complaint of the plaintiff, amounted to twenty-seven thousand eight hundred and fifty-two dollars and seventy-seven cents. The plaintiff also deposed that the cash-book showed that Daniel Gibb charged commissions on interest, and interest on commissions paid himself, and he refers to entries made in the cash-book in verification of his statement on this point, and he also refers to the ledger, which contains an account against the plaintiff for money advanced to him, which the plaintiff alleges has passed through the cash-book and formed a part of the same on which the said Gibb charged commissions. The plaintiff further deposed that until March, 1862, Daniel Gibb was in the habit of compounding monthly the interest upon his advances, and then upon the plaintiffs remonstrating against this course of dealing, he attempted to correct it by making entries in the journal for the purpose. The plaintiff further deposed that Daniel Gibb opened in his books an account called "Rental account" which was of rents to become due his lessors—the New Idria Mining Company—for the mining premises and property, in which he credited himself with having paid the rents, when in fact he had paid no rents since August, 1859, and on such pretended payments of rent had charged interest and commissions.

The affidavit of the bookkeeper is in corroboration of the plaintiffs' allegations of misconduct in the matters of account between the parties, and shows affirmatively, from the books and other data of transactions from which he derived his in-

formation, that the amount of interest charged by Daniel Gibb against the plaintiff was largely in excess of that to which he was entitled, and also it tends to show that entries had been made in the cash-book from time to time of appropriations in advance of disbursements, the result of which was to make Gibb a creditor, charging interest and commissions while he was in funds from the proceeds of the mine with which to defray the expenses for which such appropriations purported to be made.

It is not necessary to particularize further as to the deficiencies and inaccuracies of these books and accounts. The plaintiff claims, and we think justly, that he was entitled, under the contract between himself and Daniel Gibb, to an account once in six months exhibiting truly the amount of sales of the product of the mine and when made, as well as the amount of moneys paid and disbursed by Daniel Gibb in carrying on the business of the enterprise in which they were mutually concerned. And that he might become informed of the condition of the affairs of the mining business, his associate Gibb was in duty bound to keep books and accounts which should exhibit the transactions of the mining business as they actually transpired, and from which the half yearly accounts to be rendered could be made up, so as to afford proper data upon which settlements between them could be made. He also maintains, and we think with equal justice, that Daniel Gibb had no right to appropriate to his own use the proceeds of sales of quicksilver after the same were received without giving to the plaintiff the immediate benefit of the share thereof belonging to him in extinguishment of the principal and interest due from him to his associate for advancements made on account of the mining business, and also that it was his duty to account for whatever gains might have been derived from the use thereof while the same remained in his hands; nor the right to charge commissions on interest, nor interest on commissions retained; nor the right to charge plaintiff with both interest and commissions on money advanced to him; nor to compound the interest upon the advances made by him on account of the mining business; nor to credit himself with having paid rents when in fact he had not paid the same.

The charges made by the plaintiff against Daniel Gibb and the defendants were sought to be met by the defendant Will-

iam Gibb, either by direct denial or matters in avoidance; and in reference particularly to the conduct and management of the business of the mine and the disposition of its products and all matters connected therewith, prior to the departure of Daniel Gibb to Europe, we shall consider the affidavits of William Gibb as controverting the allegations of the plaintiff tending to impeach their fairness and compliance with the provisions of the contract entered into between the parties. And so far as the defendant Forbes has been or may be concerned in the controversy, we shall regard his affidavit and the affidavits of William Gibb as to his connection with the matters in issue as exonerating him from any wrongful intent toward the plaintiff; though from his connection with the firm of Daniel Gibb & Co., and through it with Daniel Gibb as he individually stood related to the plaintiff in business, he must abide, as the consequence of his predicament, the result of the controversy between the plaintiff and the representatives of the estate of Daniel Gibb, deceased. The defendant Richards, as the holder of the promissory note due from the plaintiff to Daniel Gibb, and as having received it when overdue, must be regarded as having accepted its transfer subject to all equities and equitable or other lawful defenses which at that time existed in favor of the plaintiff against the enforcement of its payment in the hands of Daniel Gibb.

The matters charged in the complaint and affidavit of the plaintiff, taken as true, in our judgment authorized and demanded the interference of the court below by the injunction granted; and the right to this remedy to secure redress for the injuries and grievances which the plaintiff had sustained by the misconduct of his associate in business, as alleged in the most solemn and accredited mode, must be deemed as established for the purposes of the case as it now stands before us, unless it appear that the matters so alleged and sustained by other evidence in corroboration was reduced at least to a state of equipoise by the affidavits and proofs produced on the part of the defendants.

Regarding the affidavits of William Gibb as putting in issue the allegation of the plaintiff's complaint and affidavit, is perhaps giving to them more importance than is their due; but so regarded, they fail to overcome the plaintiff's proof derived from the books and other data obtained from Daniel

Gibb, supported by the affidavit of the bookkeeper, who carefully examined them, as well as by that of the plaintiff. The evidence drawn from this source, the defendants did not attempt to controvert by a denial that the facts were as appeared by these books, and other data constituting evidence of transactions connected with the mine and with sales of its products, of which the books furnished no accurate detail. The evidence which these books and the accounts obtained from Daniel Gibb furnished is strongly corroborative of the most material portions of the plaintiff's complaint, and is strongly in support of his allegations of the wrongs and injuries of which he complained.

It is not our purpose to express an opinion as to all the questions submitted to us in this case, as to do so we apprehend would not afford to the parties any more certain guide for the future than they now have, and if it would, we deem it inexpedient to do so, as the undertaking would involve a labor perhaps without precedent in this court, and would require an opinion of inexcusable length.

The record and argument of counsel exceed seven hundred printed pages, all of which we have examined and to the same have given a deliberate consideration.

By the instrument in writing entered into between the parties in August, 1858, Daniel Gibb was declared to be the agent, and it was agreed that he should continue to be, until the termination of the lease therein referred to, the sole agent and attorney irrevocable of the plaintiff, and of the interest conveyed to him, in all matters and things appertaining or in any way belonging to and concerning the lease and the interest in the lease conveyed to him by such instrument, and that said Gibb should continue to work the mine and manage the concerns thereof and of the lease in such manner as to him might seem most to the advantage and interests of those concerned therein.

The plaintiff's counsel insist that the office of Daniel Gibb as the agent and manager of the mining business of the parties could be fulfilled only by his personal service, and that as a consequence he could not delegate to a substitute the performance of those services, and that by attempting to do so and leaving the state without the plaintiff's consent, he abandoned the contract and thus by his own act rendered further per-

formance of his duties as agent and manager impossible. But these consequences, in our view of the duties appertaining to Daniel Gibb's agency, do not necessarily follow. The magnitude of the enterprise required that many of the duties connected with it should be performed by subordinates of his appointment; and it might be that his personal attention to the business in its relations to foreign markets was as necessary to the successful prosecution of the enterprise, as the same was at home—and we think in such event it was competent for him to appoint a discreet and proper person to superintend and manage in his stead the affairs of the concern at home during his absence abroad. Whether or not he appointed a proper substitute to act in his stead during his absence it is not important to inquire, now that Daniel Gibb is dead.

It is argued on plaintiff's behalf that as the contract between the parties was for the personal service of Daniel Gibb as the agent and manager of the business of the mine, including all necessary expenditures and all sales of its products, the agency created and the powers reserved or granted, as the case may be, ceased with his death; while on the part of the defendants it is maintained that the powers reserved by Daniel Gibb, and conceded by the plaintiff as manifested by their contract, were powers coupled with an interest in Daniel Gibb in the subject matter to which the contract related; and this fact being assumed as true, it is argued that the agency, with all its incidents, survived the death of Daniel Gibb and of consequence passed to those who succeeded to his estate as his heirs, legatees or devisees or personal representatives. Daniel Gibb was not and could not be, in a strictly legal sense, the agent of his own interest in the mine and the contemplated productions of it. When he granted to the plaintiff one-third of his interest and estate in the leasehold and property of the mine he reserved the right to manage and conduct the business of the enterprise. With the property acquired by the plaintiff by the grant, the agency reserved or derived was not united by any interest of Daniel Gibb therein; nor had he a property interest in the plaintiff's share therein, except by way of mortgage or lien as security for the due payment of all outlays and expenditures made or liabilities incurred or to be incurred on account of working the mine and managing the concerns thereof, and as security for the

due payment of the commissions and interest to which he should be entitled according to the provisions of the contract. After the conveyance to the plaintiff of the one-third of the leasehold estate and interest in the mine, Daniel Gibb had no power, reserved or granted, to convey the same to any person. He had, as already appears, the sole and irrevocable power to manage the business in which they were jointly concerned; and over the plaintiff's share his power did not extend as a power coupled with an interest, with the incidents appertaining to this class of powers. He had a lien upon the share conveyed to the plaintiff at the moment it vested in him, provided outlays and expenditures had then been made or liabilities incurred beyond his receipts from the sales of the products of the mine; and also to secure the payment for such outlays and expenditures as might thereafter be made or fairly incurred and for interest thereon and commissions which might accrue, beyond receipts in hand, a lien might arise; but that such a lien was then or might thereafter arise and exist did not unite the interest of the plaintiff in the leasehold property with the power reserved to Daniel Gibb to work the mine and manage the mining business as principal in his own behalf and as agent for the plaintiff as to his share and interest therein.

Had Daniel Gibb lived the power reserved would have remained irrevocable unless cause had been shown for the interposition of a court of equity and for the exercise of its equitable jurisdiction depriving him of it. But when he died the agency which he had exercised in the premises for the plaintiff no longer survived.

The plaintiff and Daniel Gibb, as to the leasehold estate, were tenants in common, and as to the business of mining and the products of the mine and the moneys arising therefrom, they can only be considered as partners. By the contract between them the plaintiff granted to his partner the power to manage the business of the partnership, and by the same instrument certain rights were reserved to each of the parties, and certain duties and obligations were assumed by them respectively. Their relations to each other were analogous to those of the parties in Dunham and Dimon v. Jarvis and others, reported in 8 Barb. 88, which was a case where a ship was owned and employed by the parties to the suit. As to

the ship they were owners as tenants in common; but it was said by the court, as to the freight, the parties were partners and liable to the rule which governs the court in all cases where the partners do not agree, but one ousts the other; in which case a receiver will be appointed, when necessary to the protection of the interests of the parties.

It is argued by the defendants' counsel, upon the authority of adjudged cases, that there can be no ouster between tenants in common in possession, and therefore if one takes more than his share of the profits, the only remedy is by account or by bill in equity: Searle v. Colt, 1 Younge & C. 42; Frink v. Morewaring, 2 Beav. 119; Tyson v. Fairclough, 2 Sim. & S. 144; Street v. Anderton, 4 Bro. C. C. 414. The suit by the plaintiff is by bill in equity having for its object to obtain a judicial determination of his right in the premises as a surviving partner, and further to obtain an account from the representative of Daniel Gibb, and his agents in whose hands was a portion at least of the partnership assets.

By the death of Daniel Gibb not only did the agency which he before then exercised in respect to the plaintiff's interest in the mining business become extinct, but the partnership existing between them in working the mine became dissolved, and the rights which pertain to a surviving partner upon dissolution of the partnership by the death of one of the partners thereupon accrued to the plaintiff, and he then became clothed with authority to take charge of and close up the business of the partnership: Ex parte Williams, 11 Ves. 5; Villiamy v. Noble, 3 Meriv. 614.

The agreement by which their partnership relations was established did not provide for its continuance after the death of Daniel Gibb. Even if the language of the instrument tended to support the theory of a continuance of the partnership after Gibb's death, it would not be admissible to hold that it survived that event, so long as the question might be involved in reasonable doubt, for in the absence of the clearest and most unambiguous language evidencing that Daniel Gibb provided for the continuance of the partnership, it cannot be found that he designed that the estate which he might leave at his death should be involved in an enterprise to be managed by its surviving partner or some other person: Story on Partnership, sec. 344a.

The plaintiff complains of the violation on the part of Daniel Gibb during his life, and by the defendant William Gibb subsequently, of the partnership obligations imposed by the agreement between the original parties on Daniel Gibb; and he alleges a threatened continuance of wrongs operating in a denial and destruction of his rights and prerogatives in the premises; and the question is presented whether the court should interpose for his protection by injunction until the proper remedy may be administered for his relief. The injunction granted restrains the defendants, their agents, attorneys and servants from interfering or meddling with the interests of the plaintiff in the lands and mine, and from interfering or meddling with or disposing of any of the quicksilver products of the mine, or of the rents, issues, proceeds or profits thereof or the moneys arising therefrom, which have come or may come to them or either of them, or under their control, subsequent to the seventeenth day of December, 1861, on which day Daniel Gibb died. And also from negotiating, assigning or transferring the promissory note in the hands of the defendant Richards, or from commencing any other action thereon than the one then pending.

It is claimed on the part of the defendants that this injunction interferes with the interest of the estate of Daniel Gibb in the mine, and that by it his successors in interest, represented in the person of William Gibb, are prevented from the use and enjoyment of the portion of the premises which belongs to them. But is this true by the terms of the injunction? It was the plaintiff's interests in the lands and mine and the quicksilver products, proceeds and profits thereof that the injunction operated to protect and nothing more. That he was entitled to protection as to these results from the rights which he then possessed as the owner of one undivided third of the property, real and personal, and as the survivor of the partnership. It may be true that the interest of the estate of Daniel Gibb, deceased, in the mine could not, while the injunction may be in force, be rendered of use and profit, because of its conditions as interblended with the interest of the plaintiff therein, but that is a predicament of its condition, and is unavoidable, unless the plaintiff's interest is denied protection. If the party holding an undivided interest in property as a tenant in common with another, the usufruct

of which belongs to them jointly, as partners or otherwise, wrongfully excludes that other from it and all beneficial use of any share of it, he cannot justly complain if he is so restrained from interfering with or using his companion's share as also to become deprived of the use and enjoyment of his own. The maxim is, Sic utere tuo ut alienum non laedas. In Hall v. Hall, 12 Beav. 417, the master of the rolls said: "If the court of chancery cannot interfere in partnership affairs without great loss to both parties, is it fitting that one of them should in the meantime be permitted to act in such a manner as to make it impossible for the other to enjoy his undoubted rights, and insist on having his own way in everything, even to the exclusion of his copartner? This sort of proceeding cannot really be allowed."

If Daniel Gibb had continued to live, it may be the working of the mine and his management and prosecution of the business of the enterprise could not have been suspended by injunction, nor a receiver or manager appointed to take charge of it, provided adequate security was given on his part to account and pay to the plaintiff his share of the proceeds of the mine. Dunham v. Jarvis, 8 Barb. (N. Y.) 88; Street v. Anderton, 4 Bro. C. C. 414; but having died, new relations between the plaintiff and those succeeding to the property rights of the deceased arose. By this event the agency of Daniel Gibb for the plaintiff ceased, the partnership in working the mine became dissolved and the plaintiff succeeded to the rights of a surviving partner, and as such is in a position to require an accounting by the personal representatives of the deceased and the immediate agents whom he employed to dispose of the products of the mine.

This case has been ably and elaborately argued by the counsel engaged in its investigation, and many decisions of courts and works of elementary writers of high authority have been cited in support of the positions by them respectively assumed, which we have not passed by without examination, but we have omitted any special reference to many of them because of the great length to which our opinion would be extended were we so to do.

What may appear to be the ultimate rights of the several parties to this suit when the same comes to be tried and determined upon the merits, we can have no opinion. But if it

shall then appear that the plaintiff is indebted to the estate of Daniel Gibb, to secure which a lien exists upon his interest in the property, the court below will have the power to afford the appropriate protection and relief. As the case appears upon the record before us, we can only hold that the injunction granted should be permitted to stand.

Order affirmed.

We concur: Rhodes, J.; Shafter, J.; Sanderson, C. J.; Sawyer, J.

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J. STEINER, Appellant, v. AMERICAN FALLS MINING COMPANY, Respondent.

No. 433; March 6, 1865.

**Pleading—Demurrer—Complaint Good in Part.—The sustaining of a demurrer to a complaint containing three counts is error if one of the counts is good as set out.**

Tuttle & Fellows for appellant; Jo Hamilton for respondent.

SHAFTER, J.—Demurrer to the complaint for want of facts and on the ground of uncertainty. The demurrer was sustained, and the plaintiff declining to amend, judgment was entered for the defendant.

The complaint contains three counts. The second count in the original complaint is sufficient both in substance and form; the other two are uncertain and perhaps substantially defective. But inasmuch as the demurrer was to the whole complaint instead of being limited to the defective counts, it should have been overruled.

Judgment reversed and cause remanded.

We concur: Rhodes, J.; Currey, J.; Sawyer, J.; Sanderson, C. J.

SAMUEL McKEOWN, Appellant, v. H. O. BEATTY et al., Respondents.

No. 430; March 6, 1865.

**Payment—Legal Tender Act.**—A Judgment on a Contract entered into before the passing of the national legal tender acts is payable in such treasury notes as are specified in such acts, unless the contract expressly provided for payment in gold.

APPEAL from Sixth Judicial District, Sacramento County.

H. H. Harker for appellant; H. O. Beatty, J. P. Counts, and Porter & Holladay for respondents.

SAWYER, J.—The contract upon which the judgment was entered having been executed before the passage of the acts of Congress making treasury notes a legal tender in payment of debts, the only question is whether the judgment can be satisfied by payment in such treasury notes as are specified in said acts.

We have recently decided the question in the case of Higgins v. Bear River and Auburn Water and Mining Company, 27 Cal. 153. And on the authority of that case the order appealed from is affirmed.

We concur: Currey, J.; Rhodes, J.; Sanderson, C. J.

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PEOPLE, Respondent, v. R. H. WATERMAN and M. E. RITCHIE, Administrators of A. A. RITCHIE et al., Appellants.

No. 409; March 6, 1865.

**Taxation—In an Action to Collect Delinquent Taxes,** an averment in the complaint, that "the tax collector had failed to collect the said tax aforesaid by reason of his inability to find sufficient property of the delinquents," is a material averment, as tending to show it is neither irrelevant nor frivolous.

**Pleading.** *In an Action to Collect Delinquent Taxes* a demurrer to such an averment in the complaint that "the tax collector

had failed to collect the delinquent tax aforesaid by reason of his inability to find, seize or sell property of the delinquents," is not contrary to the act of 1861, page 471, which provides that the defendant in such cases shall not be allowed to show any informality in the levy or assessment as a defense.

**Taxation.**—In an Action to Collect Delinquent Taxes an answer denying an averment in the complaint that "the tax collector had failed to collect the delinquent tax aforesaid by reason of his inability to find, seize or sell property of the delinquents," indicates a defense on the ground, not that the defendants were not liable to pay the taxes sued for, but that the suit had been brought prematurely.

Attorney General and J. E. Ford, District Attorney, for respondent; Whitman & Wells for appellants.

SHAFTER, J.—This is an action brought under the act of May 17, 1861, for the collection of delinquent taxes, levied under the revenue act of 1857, upon certain lands situate in the county of Napa, belonging and assessed to the estate of A. A. Ritchie, and the defendant Forbes. The defendants filed an answer which was subsequently struck out on motion, as being irrelevant and frivolous. The defendants having failed to file an amended answer within the time limited by the court, judgment was entered in favor of the people.

The complaint contained an allegation that "the tax collector had failed to collect the delinquent tax aforesaid by reason of his inability to find, seize or sell property belonging to the delinquents," which allegation the answer denied. The question is upon the materiality of the averment. The case of People v. Pico, 20 Cal. 595, and of People v. Holladay [25 Cal. 300] (April term, 1864) are decisive that the averment was a material one. The point presented in no manner involves the meaning or constitutionality of that clause of the second section of the act of 1861 (p. 471), which provides that the defendant shall not be allowed to set up or show any informality in the levy or assessment as a defense—such defendant being allowed only to "plead" two defenses particularly named. The answer here set up no new matter; the traverse was of a material fact, and a decision of the issue so raised involved no inquiry into the formality of the assessment nor into the formality of the levy. The defense, it will be seen, did not go upon the ground that the defendants were not liable to pay the

taxes sued for, but upon the ground that the suit had been brought prematurely.

Judgment reversed and new trial ordered.

We concur: Sanderson, C. J.; Sawyer, J.; Rhodes, J.; Currey, J.

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JOHN A. GRYFF, Appellant, v. CYRUS ROHRER et al., Respondents.

No. 393; March 6, 1865.

**Payment—Legal Tender Act.—A Judgment on a Contract entered into before the passage of the national legal tender acts is payable in such treasury notes as are specified in such acts, unless the contract expressly provided for payment in gold.**

APPEAL from Seventh Judicial District, Sonoma County.

Temple & Thomas for appellant; Thos. L. Carothers for respondents.

SANDERSON, C. J.—On the 20th of February, 1864, the plaintiff recovered a judgment against the defendants for the sum of $4,874.41 debt, interest, and costs, not payable in a specified kind of money. On the twenty-fifth day of the same month the defendants paid into court for the use of the plaintiff the amount of the judgment and accruing interest in United States legal tender notes, and, upon notice to the plaintiff moved the court for an order directing satisfaction of the judgment to be entered of record. This motion was resisted by the plaintiff upon the ground that the debt upon which the judgment was rendered was contracted prior to the passage of the act of Congress declaring the notes in question a legal tender for the payment of debts. The motion was sustained by the court, and satisfaction accordingly entered of record, from which the plaintiff appeals.

In Higgins v. Bear River and Auburn Water and Mining Company, 27 Cal. 153, decided at the present term, we held that the notes in question were a legal tender for the payment of debts contracted prior to the passage of the act of Con-

gress authorizing their issue and declaring them a legal tender. Upon the authority of that case the order in question must be affirmed.

For obvious reasons we deem it unnecessary to notice the technical objections made to the transcript by the respondents. The case is with them on its merits.

Order affirmed.

We concur: Sawyer, J.; Currey, J.; Rhodes, J.; Shafter, J.

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LEVI DECKER, Respondent, v. MATTHEW E. HUGHES, Appellant.

No. 458; March 6, 1865.

**Contract—Option.—A Contract may be so Made as to be Optional** on one of the parties and obligatory on the other, or obligatory at the election of one of the parties; but if as so made the option or election is to be exercised within a time named, after that time it cannot be claimed as a right.

APPEAL from Twelfth Judicial District, San Francisco County.

S. F. & J. Reynolds for respondent; C. V. Gray for appellant.

SHAFTER, J.—Replevin to recover the possession of two billiard tables. It was admitted that the tables belonged originally to the plaintiff, but the defendant claimed that they had become his property by purchase before the bringing of the action. The contract under which the defendant claimed was made by the plaintiff with one Clayton, and was as follows:

"It is hereby mutually agreed between parties whose names are signed to this instrument, that R. H. Vance, as agent for Levi Decker, has this first day of July, 1862, leased to H. J. Clayton of San Francisco three rosewood billiard tables, slate beds, complete, for the term of one year from date at the

monthly rent of one hundred dollars payable monthly in advance. The said tables are to be placed in the Lick House in this city and to be put up and kept in repair by said Clayton at his own expense. It is also further agreed that the said Clayton has the privilege of purchasing the said tables on or before the expiration of this lease, for the sum of twelve hundred dollars, with interest added at the rate of two per cent a month from the commencement of this lease to the time of purchase. It is also further agreed that if the said Clayton should elect to purchase the said tables within the term of this lease, all rents which he may have paid for the use of said tables shall be counted in as part payment for said tables.

"San Francisco, May 29, 1862."

This contract was signed and sealed by both parties.

It appeared that R. H. Vance was general agent of plaintiff, and had authority to do anything in the way of making contracts for him—plaintiff residing in New York. That on the 5th of July, 1862, the plaintiff brought suit against Clayton for one hundred dollars, for the rent mentioned in the agreement set out in the answer, for the month of July, 1862, and recovered a judgment for said amount and costs, amounting to one hundred and eleven dollars and fifty cents, which was paid by Clayton. That Clayton thereafter assigned all his rights and claims of every kind under and by virtue of said agreement, and said payment under said judgment, to the defendant, and plaintiff had notice thereof. That after said assignment, plaintiff's agent delivered to Clayton (who informed him he had assigned to defendant) three billiard tables, packed up, which were then delivered to defendant by Clayton. That defendant unpacked the tables; found one badly damaged and imperfect; notified plaintiff's agent, who came and inspected it, and took it away for repair, promising to deliver another in its place.

That subsequently in August, 1862, defendant, by his attorney, demanded of plaintiff possession of the third billiard table to which he was entitled under the agreement; that plaintiff said he would deliver it if defendant would put it in the Lick House; that defendant's attorney replied, it was time enough to ask defendant to put the tables in the Lick House when plaintiff had delivered them to defendant. That the third table never was afterward delivered to defendant.

That, on the thirtieth day of June, 1863, defendant's attorney called on plaintiff's counsel, John Reynolds (at his office), and told him that he called on behalf of defendant, as assignee of Clayton, to notify plaintiff, through his agent, Vance, that defendant elected to purchase the tables under the agreement, and that defendant was then ready to pay, and he produced for payment, thirteen hundred and forty-seven dollars and twenty-eight cents (in treasury notes), the amount required, according to said agreement, for said tables, if said third table was delivered to him; or, if the plaintiff chose not to deliver the third table, defendant was ready to pay the proportionate price for the two defendant had, amounting to eight hundred and fifty-seven dollars and fifty-two cents. That Reynolds said plaintiff's agent Vance was not, as he believed, in town, and he (Reynolds) was not authorized to receive any money or give any title to the tables; but if they chose to pay any money to him, he would receive it. That no money was paid to him, and he informed defendant's attorney (in reply to an inquiry) that plaintiff's agent, as he believed, made his headquarters when in San Francisco at Vance's Daguerreau Gallery. That defendant's attorney then went to said gallery, and saw the proprietor, who informed him that plaintiff's agent was in Washoe, but made his headquarters when in San Francisco at said gallery. That defendant's attorney then stated in said gallery, and to said proprietor, what he had already said to Reynolds, and produced and exhibited the money which he was prepared to pay as before mentioned, and the proprietor replied he had no authority to act for plaintiff or his agent, and knew nothing about the matter. That defendant's attorney then made a similar offer at the defendant's place of business; and on the same day copies of the following notification, signed by defendant and addressed to plaintiff's agent, were left respectively at the office of Reynolds and at Vance's gallery before mentioned:

"Mr. Levi Decker or R. H. Vance his agent:

"Sir—I hereby notify you that I elect to purchase the three billiard tables leased by you to H. Clayton, on the terms mentioned in said lease, which was assigned to me; and I am ready to pay the money therefor on delivery of the third table, which I have not yet received. Or, if you prefer not to de-

is whether the verdict was justified by the evidence; for there can be no doubt that the question of variance made by the defendant under the motion to nonsuit was correctly disposed of by the court, on the principles of the common law. It was alleged in the complaint that the plaintiff was induced to sell the goods to Hobbitzell under the influence of a fraud practiced by him in connection with Stidger, and it turned out in evidence that the particular fraud alleged was managed by Hobbitzell alone.

It is insisted for the appellant, that there was no evidence tending to prove that Hobbitzell—as whose goods the property sued for was attached by the defendant under process in favor of one Stidger—had induced the plaintiff to sell and deliver the goods to him by false and fraudulent representations. We have examined the testimony attentively, and have fully considered the views presented by the counsel of the appellant, as to the facts which it is necessary for a vendor to prove in order to vitiate a sale of chattels on the ground of fraud. While we hold that the general principles maintained by the counsel of the appellant in relation to that matter are substantially correct, yet we consider that the testimony of the plaintiff makes a case fully within them. There is another particular, however, in which the verdict is obnoxious to the objection taken against it. It appeared distinctly, and from the testimony of the plaintiff's witnesses, that a portion of the goods sued for and recovered were not included in the sale of the plaintiff to Hobbitzell; but that they were bought by Hobbitzell subsequently and from other parties. The value of that portion of the goods was two hundred and fifty-seven dollars, and to them the plaintiff had no title on his own showing. To this extent the verdict is not only unsupported by the evidence, but is in direct opposition to it.

Judgment reversed and new trial granted.

We concur: Rhodes, J.; Currey, J.; Sawyer, J.; Sanderson, C. J.

WILLIAM CODDINGTON, Survivor, etc., Respondent, v. STEPHEN HOPKINS et al., Appellants.

No. 431; March 6, 1865.

**Foreclosure of Mortgage—Description.—To Uphold a Demurrer to a Complaint** in foreclosure on the ground of indefinite description of the premises it must appear that the description is so vague that no part of the land may be located by reference to it.

**Foreclosure of Mortgage—Description—Testing Rights of Parties.**—Demurrer to a complaint in foreclosure is not a proper way to test whether the property set out as the mortgaged property is sufficiently described, since the decree in foreclosure gives the plaintiff only what the mortgage calls for. When, after the foreclosure, the mortgagee takes possession, his right to the particular property can be tested by bringing an action against him.

**Pleading—Extension of Time to Answer.**—A motion for the allowance of more time to a defendant for the filing of his answer, on the ground of his being absent, is properly denied when it appears that he was personally served with the complaint in ample time and the affidavit accompanying the motion is insufficient as an affidavit of merits.

APPEAL from Eighth Judicial District, Humboldt County.

James Hanna for respondent; H. W. Havens for appellants.

SANDERSON, C. J.—This is an action to foreclose a mortgage. Only one of the defendants, Lyman Fish, appeared in the action, who demurred generally to the complaint alleging that the same did not state facts sufficient to constitute a cause of action. The complaint is in the usual form in such cases, and alleges that Lyman Fish, among others, has or claims to have some interest or lien upon the mortgaged premises or a part thereof, which interest or lien, if any, was acquired by him subsequent to the lien of the mortgage in suit. The complaint contains a full copy of the mortgage in which the premises are described as follows:

"All that piece or parcel of land consisting of one hundred and sixty (160) acres, with one grist mill and one saw mill combined, situated near the mouth of Mad river and called the Mad river Mills."

The ground of the demurrer is that this description is fatally defective and that the mortgage is therefore void, as against the appellant at least, for uncertainty. The demurrer was overruled by the court below, which the appellant claims was error.

It is argued that the description is bad because neither the state, county or township in which the land is situated is designated, nor any corners, posts, monuments or initial points, or lines, courses, or distances given by which the location of the land can be ascertained, or its quantity measured and segregated from that adjacent thereto.

It appears from the complaint that the mortgaged premises are situated in Humboldt county, and that the mortgage was duly recorded in that county. It also appears from the mortgage itself that the mortgagors and mortgagees were all residents of that county at the time the mortgage was executed.

The question attempted to be presented by the demurrer is whether under these circumstances the description of the premises was sufficient to import notice to Fish at the time he acquired his interest therein and consequently whether anything passed by the mortgage as against him. Although it is not suggested by the respondent, we think it doubtful whether this question can be properly made in this action. This action does not try the title to the mortgaged premises or any part thereof, but merely forecloses the lien of the mortgage as to whatever estate may pass by the description without determining whether any estate whatever has passed to the mortgagees. The decree follows the description given in the mortgage, and so will the sheriff's deed if no redemption is made. When the purchaser seeks to obtain possession of the land the title will come in issue and Fish can then properly make the defense which he attempts to make now, and such defense can be in no respect prejudiced by any proceedings had in this case. The mortgagees are entitled to have their mortgage foreclosed as it is written, for if any estate does pass by the mortgage decree and deed, they are entitled to it. If nothing passes, the whole proceeding from the commencement to the end is without consequence, and the only parties injured are the mortgagees: Tryon v. Sutton, 13 Cal. 490.

But whether such be the proper view or not, we think the demurrer was properly overruled. To uphold the demurrer

it must appear that the description is so defective as not to identify any part of the premises, for if by its light any part can be found and located, as to such part at least a cause of action is stated. This is not a case of patent ambiguity. If there is any difficulty in finding and locating the land, it is presented dehors the mortgage. The "Mouth of Mad River," so far as we can judge from the face of the record, is a sufficient location call. When that point is reached, it may be that the entire premises can be readily located, at all events there can be no difficulty in finding the "Mad River Mills." Such being the case the description is good, at least so far as the mills are concerned, and is sufficient to pass them and the land under and around the same sufficient to insure their convenient use and enjoyment: Maddox v. Goddard, 15 Me. 218, 33 Am. Dec. 604; Blake v. Clark, 6 Greenl. 436; Whitney v. Olney, 3 Mason, 280, Fed. Cas. No. 17,595; Gibson v. Brockway, 8 N. H. 465, 31 Am. Dec. 200; Marshall v. Niles, 8 Conn. 369; Crosby v. Bradbury, 20 Me. 61.

The demurrer having been overruled, counsel for the defendant moved the court for an order allowing such further time for the preparation and filing of the answer as would be reasonable under the circumstances of the case. This motion was denied by the court, and it is next claimed that this was error.

This motion was supported by an affidavit made by the defendant's wife to the effect that her husband was at that time in the Boise river country in Idaho Territory, and had been for about eight months, and that it required from two to three months to communicate with him. That from information derived from her husband she believed that he had a good defense, which could be successfully made if sufficient time was allowed, etc.

It appears from the record that the summons was served on Fish on the seventeenth day of January, 1863, personally and within the jurisdiction of the court. On the seventh day of February, 1863, he filed his demurrer, which was not passed upon by the court until the 14th of March, 1864.

Thus the defendant had ample opportunity to prepare and make any defense which he might have to this action on the merits, but he voluntarily left the state without doing so and without leaving his answer or giving his counsel instructions

or putting him in possession of the facts constituting his defense, if he had any. In addition the affidavit was altogether insufficient as an affidavit of merits. The affiant does not state what the facts constituting the defense are, although she claims to have information touching them which she derived from her husband. She neither states the facts according to her information, nor that she has stated them to counsel learned in the law, and been advised that they constitute a defense; but contents herself with saying that there are certain facts and circumstances (without detailing them) of which she has been informed by her husband and which she believes would amount to a good defense. Moreover, she gives no reason why this defense of which she is informed cannot be made just as well without the presence of her husband as with it. We think the application was a frivolous one, and doubtless such was the view of the court below.

Judgment affirmed.

We concur: Sawyer, J.; Shafter, J.; Currey, J.; Rhodes, J.

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JENNINGS (DOWLING), Appellant, v. J. S. POLACK, Respondent.

No. 501; March 6, 1865.

**Injunction—Dissolution.—The Filing of a Bond After the Expiration of the time named in an order dissolving an injunction, unless a bond be filed within such time, cannot keep the injunction alive.**

APPEAL from Twelfth Judicial District, San Francisco County.

E. L. B. Brooks and Reynolds for appellant; C. Witham for respondent.

See Dowling v. Polack, 18 Cal. 625.

SHAFTER, J.—The complaint states that on the 18th of October, 1854, an injunction issued in Polack et al. v. Jennings et al. and was duly served on the defendants in that suit. That upon the issuing of the injunction an undertaking was

filed signed by L. Franklin and T. Tennent. That on the 12th of May, 1855, it was "ordered that the injunction herein be and the same is hereby dissolved, unless the plaintiffs within ten days file a bond with good and sufficient sureties in the sum of $15,000." That on the 21st of said month a new undertaking was filed signed by Franklin, Tennent and one Ford, in formal compliance with the order, and that the same was excepted to for insufficiency on the same day. That afterward, on the 31st of May, 1855, a new undertaking was filed in lieu of that last above named, wherein Polack was principal and the said Franklin and Tennent were sureties, in the words and figures following, to wit:

"In the District Court of Fourth Judicial District, State of California.

"Joel S. Polack et als.
vs.
Thomas H. Dowling et als.

"UNDERTAKING ON INJUNCTION.

"Whereas, the above-named plaintiffs have commenced an action in the District Court of the Fourth Judicial District against the above-named defendants, and have applied for an injunction in said action against the said defendants, enjoining and restraining them from the commission of certain acts as in the complaint filed in this action is more particularly set forth and described.

"Now, therefore, we, the undersigned, residents of the City of San Francisco, in consideration of the premises and of the issuing of said injunction, do severally and jointly undertake, in the sum of fifteen thousand dollars, and promise to the effect that in case said injunction shall issue, the said plaintiffs will pay to the said parties enjoined such damages not exceeding the sum of fifteen thousand dollars as the said parties shall sustain by reason of the said injunction, if the said District Court finally decides that the said plaintiffs were not entitled thereto.

"Dated San Francisco, this 30th day of May, A. D. 1855.

"(Signed) J. S. POLACK.
"LUMLEY FRANKLIN.
"THOMAS TENNENT."

The complaint alleges [illegible] ties, proceeds as follows [illegible] taking was [illegible] of the 21st of May [illegible] 2nd of April [illegible] [illegible] [illegible]

. B. McCLELLAND et al., Respondents, v. THE KING SOLOMON GOLD AND SILVER QUARTZ MINING COMPANY, Appellants.

No. 448; March 6, 1865.

**Mining Claims—Location.—The "Sixty Days" Mentioned** in the ining laws, securing rights, etc., to persons locating claims, are to e computed from the time of the location.

This was an action of ejectment. The plaintiffs alleged ntry upon and location of, for mining purposes, "all that ertain mining claim, or quartz ledge or lode, lying and being n Prairie District, Yuba County, California, described as ollows," etc. At the trial questions were submitted by the ourt to the jury, answers to which were returned, categorially by way of a special verdict, to the effect that between he 25th of December, 1863, and the 27th of February, 1864, he defendant and its grantors performed two hours' work on he claim; that they were not in actual possession on the 27th f February, 1864, and that they "have not abandoned the laim." The jury further found, as a general verdict, "that he defendants have forfeited their right to the claim by the aws of Prairie Dog Mining District, in which said mining laim is located, also find the right of possession in the plainiffs." Judgment for the plaintiff followed, and the defendnts appealed. As an addition to the special verdict it was hen stipulated by the parties that the grantors of the deendants located the ground in dispute on the 25th of Decemer, 1863, by posting notices on the claims described in the omplaint according to the mining laws of the district in hich said claims were situated; that said notice was recorded n the fourth day of January, 1864, in the office of the disrict recorder; that the plaintiffs and their grantors located he same ground on the 27th of February, 1864, by posting otices on said claims according to the mining laws of said istrict; that they recorded the notice in the office of the disrict recorder on the 28th of February, 1864, commenced work n the claim on that day and were driven off by the defendnts on the day following; that all the laws of said mining

district affecting the issues in this case are as follows, viz.: 1. "Every claim, whether by individuals or company, located shall be recorded in the district within ten days after the date of location"; and 2. "It shall be necessary for each person or company to perform, or cause to be performed, one day's labor on or for each claim of two hundred feet, every sixty days. But if any person or company shall perform, or cause to be performed three successive days' labor on each claim that he or they may possess then the title shall hold good for one year."

The principal point urged by the appellants was: "There was no forfeiture under the mining laws, because the sixty days mentioned therein commenced to run from the 'recording' and not from the 'location.'"

J. O. Goodwin for respondents; F. J. McCann for appellants.

SAWYER, J.—We think the sixty days commenced to run from the date of the location. If so, the facts appearing in the verdict and stipulation are sufficient to sustain the judgment.

Judgment affirmed.

We concur: Sanderson, C. J.; Rhodes, J.; Currey, J.; Shafter, J.

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## HARVEY B. DAVIS, Appellant, v. JAMES MITCHELL et al., Respondents.

No. 439; March 6, 1865.

**Forcible Entry and Detainer.—The Law will not Permit** a person to take forcible possession of land, even though his own, in the peaceable possession of another.

**Forcible Entry and Detainer.—A Court of Equity cannot Relieve** a person from the consequences of a forcible and unlawful attempt to redress his own wrongs.

**Forcible Entry and Detainer—Title to Land.—In an Action of** forcible entry and detainer the title to the land is not in question.

APPEAL from Thirteenth Judicial District, March 6, 1865.

A bill in equity was filed to have certain judgments vacated (see Mitchell v. Davis, 23 Cal. 381), alleged to have been obtained by fraud, and to restrain the issue of execution on these judgments. By this bill it was made to appear that in the year 1851 Davis had located and settled on certain government land and had continued to use, occupy and enjoy it ever since, but that in 1853 the defendant Mitchell contrived a fraudulent scheme, using the defendant Storer as his tool, whereby the latter was to enter upon a portion of this land and thereafter acquire from the government a certificate of purchase, to inure finally to his, Mitchell's, benefit; and succeeded in this scheme, so that, on the 30th of January, 1858, the United States issued a certificate in Storer's name. On the 16th of March of that year Davis located a school warrant on the land and then set about exposing, in the United States land office, the Mitchell-Storer fraud. He was successful in this; an opinion on the plain facts was sent on to Washington from the land office at Stockton and on the 22d of April, 1862, the general land office confirmed the opinion of the register at Stockton and set aside Storer's certificate. Meantime, however, on the 7th of May, 1859, Mitchell had brought ejectment against Davis and obtained judgment, but Davis had resisted the writ of restitution, whereupon Mitchell had proceeded against him in forcible entry and detainer and had been given judgment for six hundred and thirty dollars and costs. On the 5th of December, 1862, the school warrant located by Davis ripened into a patent and thereafter Davis filed this bill.

H. P. Barber for appellant; E. F. Hunter, respondents.

SAWYER, J.—The plaintiff is not entitled to any relief against the judgment in the action for forcible entry and detainer, or as against any proceedings resulting from it. The recovery in that action did not in any respect depend upon the title to the land, or upon the fraud alleged to have been perpetrated by defendants in entering it at the land office of the United States, or upon the judgment in the district court.

The law will not permit a party to take forcible possession, even of his own lands, if they are in the peaceable, though

wrongful possession of another, and, if he does so, he will not only be compelled to restore the possession, before his title will be investigated, but will also be punished by fine, and a further judgment for treble damages for his own infraction of the laws: Forcible Entry Act, secs. 9, 10 and 12.

In an action for forcible entry and detainer, the title is in no respect in question. A court of equity cannot relieve a party from the consequences of a forcible and unlawful attempt to redress his own wrongs. The real object of this action is to relieve the plaintiff from the judgment against him in the action for forcible entry and detainer, and himself and sureties from their liabilities upon the undertaking on appeal from that judgment. But the facts stated do not present any cause of action as to this judgment of which the court can take cognizance. There is, it is true, a prayer for relief against the judgment of the district court of the 12th of October, 1859, in favor of defendant Storer, for a recovery of the land described in the complaint. But this judgment appears to be set out merely as the foundation for the relief sought against the judgment in the action for forcible entry and detainer. It does not appear that any proceedings are being taken, or threatened to be taken, under the judgment in the district court. Nor does it appear that the plaintiff is liable in any manner to be injured by it. The judgment for the possession of the land appears to have been executed. If the certificate of location which was the evidence of title upon which the judgment in the district court was recovered has been canceled on the ground of fraud, and the plaintiff has since acquired a valid title through a patent from the state, as alleged in the complaint, the relation of the parties to the land has become entirely changed and the party has a speedy and ample remedy in an action to recover the land. But the complaint is not framed upon the theory that that judgment is any obstacle in the way of a recovery of the land, or that any other injury can have resulted from it, but upon the theory, only, that the judgment is an obstacle in the way of the relief sought as against the judgment in the action for forcible entry and detainer, and it is upon this view that plaintiff seeks to have it vacated in this action. At all events, the facts set forth are insufficient to constitute a cause of action as an independent substantive ground of relief. But the

atter judgment, as before stated, does not in any respect de-pend upon the judgment in the district court.

There is, clearly, in our judgment, no cause of action set out in the complaint. The demurrer was, therefore, properly sustained.

**Judgment affirmed.**

We concur: Sanderson, C. J.; Currey, J.; Shafter, J.; Rhodes, J.

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BURTON et al., Appellants, v. COVARRUBIAS, Respondent.

No. 563; April 3, 1865.

**Judge—When Disqualified by Relationship.—An Order Dismissing an Action,** made by a judge akin to the defendant within the third degree of relationship, is void.[1]

APPEAL from First Judicial District, Santa Barbara County.

S. F. Reynolds for appellants; Eugene Lies for respondent.

SHAFTER, J.—This appeal is from an order denying a change of venue. The correctness of the order depends upon whether the suit was pending when the motion was made—and that depends upon the validity of an order dismissing the action for want of prosecution made in 1861. The term of the court at which this order was made was held by the Hon. Joaquin Carillo, Judge, who was related to the defendant within the third degree. The order dismissing the action was null and void on the ground of the incapacity of the judge to act, as was held by us in People v. De La Guerra, 24 Cal. 73. That case was fully considered, and on a review of the whole subject we are satisfied that the decision is correct.

[1] **Cited** in Gage v. Downey, 79 Cal. 155, 19 Pac. 113, 21 Pac. 855, where it is held that when a case is transferred because of the disqualification of the judge, the determination of what court is the nearest to which the transfer should be made is within the jurisdiction of the judge, and the selection of a county seat most readily accessible, though not the nearest, whether or not erroneous, will not render the final judgment in the case void and open to collateral attack.

The order appealed from is reversed, and the court below is directed to enter an order transferring the case to a district court in and for the city and county of San Francisco, or to the district court in and for the county of Monterey in pursuance of the stipulation of parties.

We concur: Sawyer, J.; Rhodes, J.; Currey, J.; Sanderson, C. J.

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## ROBERT C. BROOKS et al., Appellants, v. WM. M. LUBBOCK, Respondent.

No. 299; April 14, 1865.

**Appeal.—The Notice of Appeal is a Document of Which the trial court has exclusive control, and the supreme court has no power to allow an amendment of either it or the admission of service having reference to it.**

APPEAL from Fourth Judicial District, San Francisco County.

Ryan for appellants; Wise for respondent.

RHODES, J.—The plaintiff's motion for a new trial was denied July 11, 1862, and his notice of appeal from the order denying the new trial, and from the judgment, was filed October 16, 1862; and from the record, it appears that the notice was served upon the defendant's attorney, October 7, 1862. The defendant moves to dismiss the appeal. The service was not sufficient to constitute an appeal, accepting the dates in the record as the true dates: Buffendeau v. Edmondson, 24 Cal. 94. But the defendant, in order to avoid the consequences that must result from a service of the notice prior to its being filed in the court below, has filed in this court several affidavits, for the purpose of proving that the service was, in fact, made on the same day the notice was filed, and that the acknowledgment of service given by the defendant's attorney was antedated. It is unnecessary to inquire whether the affidavits do show that the service was made on the day the notice was filed,

for if they clearly showed such to have been the case, they could not be regarded by this court.

Causes brought to this court on appeal are heard upon a record consisting of copies of the proper portions of the record in the court below, and of papers filed in that court. The provisions of the Practice Act, as well as the rules of this court, unmistakably indicate that the record brought to this court must consist of a transcript of the requisite portions of the record and papers in the court below, and not of original papers filed in this court. In case the transcript of the record does not contain the requisite matter, or is in any respect incorrect, it may be amended or corrected by the record or papers remaining in the court below, upon suggesting to this court a diminution of the record. If any portion of the record or papers in the court below has been lost or destroyed, their loss may be supplied in the court below, as was stated in Buckman v. Whitney, 24 Cal. 267; and if the document of which a transcript is required is incorrect, doubtless the court below has the power, upon proper proceedings, to make it conform to the truth; but whether the court below possesses the requisite power, or not, it is certain that this court has no authority to supply a lost document or record in the court below or to alter or amend those belonging in such court, in any respect or for any purpose. If this court should amend the admission of service of the notice of appeal, as it exists in the transcript filed in this court, by striking out the 7th of October, and inserting the 16th of October, it would in effect amount to an amendment of a document in the court below, and of which that court has the exclusive control, or the transcript would not be a true copy of the record and documents in the court below, and it being such, the cause would not be entitled to be considered by this court.

Appeal dismissed.

We concur: Sanderson, C. J.; Currey, J.

Justices Sawyer and Shafter, being disqualified, did not participate in the decision of this case.

WM. M. LUBBOCK, Appellant, v. ROBERT C. BROOKS et al., Respondents.

No. 299; April 14, 1865.

**Appeal—Notice.—An Appeal is not Taken, in fact, unless the notice is served contemporaneously with or after the filing of it.**

APPEAL from Fourth Judicial District, San Francisco County.

Wise for appellant; Ryan for respondents.

RHODES, J.—The respondent moves that the appeal be dismissed. The defendants' motion for a new trial was denied on the 25th of August, 1862. No notice of appeal appears in the record in this court, but the clerk certifies that "a notice on appeal in the above entitled action was duly filed as appears from an entry made in 'J' Register of Actions on the 16th day of October 1862," and that the notice of appeal has been lost. If it is admitted that the certificate of the clerk may be substituted for, and fill the place of, the lost notice of appeal, in the transcript, it does not appear that the notice was served on the respondent. An appeal is not in fact taken unless the notice is served contemporaneously with or after the filing of it, and indeed this court has no jurisdiction of the cause unless the appeal is taken as prescribed by law: See Buffendeau v. Edmondson, 24 Cal. 94; Hastings v. Halleck, 10 Cal. 31. The questions arising upon the affidavits filed in this court, to show that the notice of appeal was served the same day that it was filed, have been disposed of in considering the case of Brooks v. Lubbock, ante, p. 210 (preceding case).

Appeal dismissed.

We concur: Sanderson, C. J.; Currey, J.

Justices Sawyer and Shafter, being disqualified, did not participate in the decision of this case.

E. W. GARVITT, Respondent, v. WILLIAM ARMSTRONG et al., Appellants.

No. 429; June 5, 1865.

**New Trial—Time for Motion.—Under the Statute the Ten Days** within which a party may move for a new trial are to be computed from the day of his being given notice of the filing of the findings.

J. G. McCallum for respondent; William, Johnson & Blanchard for appellants.

SAWYER, J.—Respondent claims that the right to move for a new trial was waived, because the notice was not given till nineteen days after the filing of the findings and entry of judgment. But the cause was tried without a jury, and it nowhere appears that notice of the filing of the findings was ever served on the defendants. Under section 195, they had ten days after receiving written notice of the filing of the findings within which to give their notice.

He next insists that there is no valid statement on motion for new trial, for the reason that the statement contains no sufficient specification of the grounds upon which defendants intended to rely. The statement is certainly very carelessly and loosely made up.

As to appellants' points: The complaint is very wordy, and not by any means a model pleading. But upon the whole, we think it states a cause of action.

The answer does not, in our opinion, sufficiently aver any affirmative matter presenting any new material issue that required a replication. No question appears to have been made in any form on this point in the court below.

There is but one point upon the sufficiency of the evidence that can, with any show of reason, be claimed to be specified with sufficient particularity in the statement to entitle it to notice. Upon that point the evidence is such that we cannot disturb the finding.

We see no error in the record that would justify a reversal of the judgment. It is therefore affirmed.

We concur: Currey, J.; Rhodes, J.; Shafter, J.

Sanderson, C. J., having been of counsel, did not sit on the hearing of this cause.

PEOPLE ex rel. JAMES EDGECOMB, Respondents, v. A. J. LOOMIS, Auditor of Trinity County, Appellant.

No. 515; June 5, 1865.

**County—Purchase of Land—Mandamus to Assess Tax to Pay.**—When a statute provides, as a condition precedent to a valid purchase by county supervisors, a valuation of the property in manner specifically prescribed in the act, an alleged vendor to the county, who petitions for a mandamus to have a tax levied to pay him his price, must allege that the condition had been complied with before the sale.

**Pleading—Defective Petition.**—When from the facts stated in a petition it does not appear that the petitioner is entitled to what he asks, the petition is to be considered as substantially defective.

MANDAMUS. Ninth Judicial District, Trinity County.

Geo. Cadwalader for respondents; Howe for appellant.

For subsequent opinion, see next page.

SHAFTER, J.—This is an application for a mandamus, compelling the defendant to draw and deliver to the relator a warrant upon the treasurer of Trinity county for three thousand eight hundred dollars on account of the purchase money of a certain lot and building alleged to have been sold by the relator to said county for the purposes of a courthouse, in December, 1863.

There are a number of questions made in the case, upon one of which only do we find it essential to pass. By the ninth section of the general act, relating to boards of supervisors and their powers (Wood's Digest, 694), it is provided: "that no purchase of real property shall be made by them, unless the value shall have been previously estimated by three disinterested persons appointed by the county judge." The general act has not been altered in this particular by the act of 1863, authorizing the board of supervisors of Trinity county to levy a tax for a county building fund: Acts 1863, p. 55. The estimate of value provided for in the ninth section of the general act is a limitation upon the power of the board of supervisors to purchase; and as there is no allegation in the petition that such prior estimate was ever made, the petition must be dismissed for want of facts. And it is so ordered.

We concur: Sanderson, C. J.; Rhodes, J.; Currey, J.; Sawyer, J.

EOPLE ex rel. JAMES EDGECOMB, Respondents, v. A. J. LOOMIS, Auditor of Trinity County, Appellant.

January 2, 1866.

SHAFTER, J.—The averment in the petition that the ordiance on which the plaintiff counts was "duly passed" reates only to the proceedings immediately connected with the assage of the ordinance. Where a mandamus to license a urate merely stated that he had been duly nominated and ppointed by the inhabitants of a township to be curate of the hurch at P., without stating the consent of the rector, or the xistence of any endowment, or of a custom for the inhabitants o make such nomination and appointment, the court quashed he writ for insufficiency: The King v. The Bishop of Oxford, East, 345. Admitting that the ordinance was passed accordng to all the forms of law, it does not follow that the county ad previously become the purchaser of the building. Where, rom the facts stated, it does not appear that the petitioner is ntitled to what he asks, the petition must be considered as ubstantially defective: 7 East, 353.

The answer does not supply the defect in the petition. It tates: "That the appraisers appointed to appraise the said roperty reported among other things that said building was ot in their judgment in all respects suitable for the purposes amed." It does not appear by whom the appraisers referred o were appointed, nor is it stated, either directly or indirectly, hat they reported or passed upon the value of the building. Motion for new trial denied.

We concur: Sawyer, J.; Sanderson, J.; Currey, C. J.

[illegible] Respondent, v. [illegible], Appellant.

No. 542, June 7, 1877

**Appeal—Effect of Reversal of Judgment.**—An order made by the court after judgment and [illegible] the same effect as the judgment itself, and is reversed by a reversal of the judgment.

**Mortgage—Right of Mortgagee to Possession.**—Although a mortgagee can have legal possession only after foreclosure, after actual possession for more than five years he may not be dispossessed by a mere order of court.

APPEAL from Seventh Judicial District, Solano County.

M. A. Wheaton for respondent; Swan, Hayes & Cobb for appellant.

See Heller v. Jordan, 32 Cal. 357.

SAWYER, J.—This is a separate appeal in the case with the same title, No. 541, decided at the present term. The court as a part of the judgment in the cause, directed the receiver, after delivering his fees, to deliver over to the plaintiff the premises, and the balance of the rents and profits in his hands. After the entry of judgment, and on the same day on motion of plaintiff's counsel, without any further showing than the record and judgment in the case, the court made a separate order, directing the receiver to deliver over to the plaintiff the said premises and the rents and profits. The order was only a repetition of that part of the final judgment bearing upon the same subject, and was wholly unnecessary, as it conferred no additional rights on the plaintiff, or authority on the receiver. The appeal is from this order. The order is subsequent to judgment, and an appeal from it lies. This conclusion is not in conflict with anything said in the recent case of Whitney v. Buckman. On the contrary, in that case we said: "This appeal is not from a final judgment in a special proceeding, but an appeal from an order subsequent to judgment." The order appealed from was based upon the finding and judgment in the case. As the judgment itself has been reversed, and the finding in material parts affecting the plaintiff's right to an immediate conveyance of the land vacated, this order ought to go with them. It is contended that the

order is proper, even if the judgment should be reversed, for the reason that defendant holds the title in the character of a mortgagee, and that, in this state, the mortgagee is not entitled to the possession until a foreclosure and sale vests him with the title. Admit this to be so, yet the defendant, whether rightfully or not, has been in possession since 1858, and admitting his possession to have been wrongful, this is not the proper remedy, if there be a remedy, to recover possession pending the litigation as to the rights of the parties. Had there been but one notice of appeal embracing an appeal from the final judgment and the order, and but one transcript, as there might, and should have been, there can be no doubt that the order would have been reversed upon the reversal of the judgment. The transcript shows that it is the same case and that the order depends upon the judgment already reversed, and the rights of the parties ought not to be embarrassed by continuing the order formally upon the record, when it is in fact substantially reversed in the reversal of the judgment itself, covering the same ground. If the order had been affirmed on a separate appeal from this court, doubtless the court below would vacate it upon the reversal of the judgment upon which it was based. For these reasons we think the order should be reversed, and it is so ordered.

We concur: Sanderson, C. J.; Rhodes, J.; Shafter, J.

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PEOPLE, Respondent, v. LEON EVEART, Appellant.

No. 592; June 5, 1865.

**An Indictment Against One for Destroying a Dam Sufficiently Locates** the dam as within the county where the indictment is found when it charges that the act charged was committed within that county.

**An Indictment States the Offense Sufficiently When It Follows** the language of the statute describing the act which it makes a criminal one.

APPEAL from El Dorado County.

District Attorney for respondent; Blanchard & Edgerton for appellant.

RHODES, J.—The indictment, which was found in El Dorado county, charges that the defendant, on a day named, "at the county of El Dorado and state of California, with force and arms, did willfully, feloniously and maliciously cut, break, pull down, injure and destroy a certain dam erected for the purpose of conducting water into a certain ditch to be used for mining purposes, said dam and ditch being the property of Samuel Snow." The defendant demurred to the indictment on the grounds: "1st. The indictment does not show that the grand jury had any legal authority to inquire into the offense charged, by reason of its not being within the local jurisdiction of the county; 2d. That it does not substantially conform to the requirements of sections 237, 238 and 239; 3d. That it does not state facts sufficient to constitute a public offense." The demurrer was sustained, and judgment was rendered discharging the defendant.

The first ground is not well taken, for it is charged that the act for which the defendant was indicted was committed at the county of El Dorado, and it would have been impossible for him to have destroyed the dam at that county unless it was situated at the same county.

The indictment conforms substantially to the provisions of sections 237, 238 and 239 of the Criminal Practice Act. It contains the title of the action, the name of the court, the name of the defendant and a statement of the acts constituting the offense as prescribed by section 237; and it will stand the test afforded by sections 238 and 239.

The indictment is drawn under the act of 1863 (Stats. 1863, p. 58), amendatory of section 140 of the act of 1850, concerning crimes and punishments, and the section provides that "Every person who shall willfully and maliciously cut, break, injure or destroy" any dam or certain other structure erected for the purpose, among others, of conducting water for mining purposes, shall on conviction thereof be fined, etc.; and in stating the offense it follows the language of the statute. An indictment describing in that form the offense has repeatedly been held to be sufficient: People v. Garcia, 25 Cal. 533, and cases there cited.

As the defendant's counsel has not filed a brief in the cause we are unable to ascertain upon what particular points included within the terms of the demurrer he relies, and as we

o not observe any substantial defect in the indictment, we old it to be sufficient in law.

Judgment reversed and the cause remanded, with directions the court below to overrule the demurrer.

We concur: Sanderson, C. J.; Currey, J.; Sawyer, J.

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PEOPLE, Respondent, v. J. M. LOCKHARD, Appellant.

No. 593; June 5, 1865.

**Trial.—The Refusal of Particular Instructions** asked is not reversible error, even though properly they might have been granted, in a case where the court has put the substance of these instructions into the charge it actually gave.

**Trial—Instructions.—Inaccuracy or Want of Precision** in instructions to a jury is not reversible error unless thereby the party complaining was actually prejudiced.

**Criminal Law—Principal and Accessories—Instructions.**—One who could not have been proceeded against as other than a principal cannot be prejudiced by a refusal to grant instructions relating to accessories.

**Criminal Law—Refusal of Instructions—Effect on Jury.**—The mere fact of refusing particular instructions asked by the defendant cannot prejudice the jury against him when the jury has not heard them read and refused as read.

APPEAL from El Dorado County.

Attorney General for respondent; Searle & Blanchard for appellant.

SAWYER, J.—The appellant was indicted for stealing cattle, and convicted of the crime of grand larceny.

When considered as abstract legal propositions, disconnected from the context, there is some want of precision, and even some inaccuracy in the portions of the judge's charge complained of in the first point discussed by appellant's counsel. There can be no possible doubt upon the testimony that the conversion of the cattle, if there was any, was with a felonious intent. Taken in connection with the testimony, and that

portion of the charge which immediately precedes the first passage complained of, and with other portions of the charge, and several very pointed instructions upon the same point given at the request of the prisoner, we think there can be scarcely a possibility that the jury could have been misled by the inaccuracies, or have misapprehended the law applicable to the case. As to the instructions asked by the prisoner and refused, some of them, if correct as legal propositions, were abstract, and not justified by the state of the evidence; others required modifications, and others were more than once substantially given in less objectionable language, in the charge of the court and other instructions asked on behalf of the prisoner; while several of the instructions given at his request were more favorable to him than the law would justify. Instructions refused, as is the proper practice, are rarely read by the court, or commented on in the hearing of the jury, or even read by counsel in their arguments in the form in which they are presented to the court for its ruling. And unless so brought to the notice of the jury, the jurors know nothing about them, and no harm can possibly result from not stating particularly, at the time of the refusal, that they were refused because in substance they had already been given. But if read in the hearing of the jury by the court, and refused on that ground, the reason of the refusal should, doubtless, be stated.

The several instructions relating to accessories before and after the fact, asked on the part of the prisoner, and refused, were all properly refused, if for no other reason, on the ground that the character of the testimony was not such as to require or justify any instructions at all upon that subject. The prisoner was indicted as principal, in connection with another party, and upon the testimony, if guilty at all, he could, in our judgment, have been guilty in no other character than that of principal. There was nothing from which the jury could properly infer that the prisoner was an accessory merely. The instructions on the point would only have tended to embarrass and confuse the jury.

With regard to the question as to the sufficiency of the testimony, we think it fully sustains the verdict.

Upon the whole we think there is no error in the record that would justify a reversal of the judgment.

Judgment affirmed.

We concur: Sanderson, C. J.; Shafter, J.; Rhodes, J.; Currey, J.

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PEOPLE, Respondent, v. WELCH, Appellant.

No. 667; July 13, 1865.

**Larceny—Legal Tender Act.—In Fixing Fifty Dollars as the value test of property stolen, in order to make the charge grand larceny, the legislature is not presumed to have contemplated national legislation thereafter making a new sort of money legal tender.**

APPEAL from Contra Costa County.

Attorney General for respondent; Thomas A. Brown for appellant.

SAWYER, J.—The defendant was indicted for grand larceny. The statute provides that every person who shall feloniously steal goods, etc., "of the value of fifty dollars, or more, shall be deemed guilty of grand larceny": Wood's Digest, 337. According to the estimate of some of the defendant's witnesses, the value of the stolen property in the aggregate would be some twenty-five to thirty dollars, considerably less than the amount necessary to constitute grand larceny. On the cross-examination, the district attorney, under objection and exception on the part of the defendant, was allowed to show that these witnesses, in estimating the value of the property, took gold and silver coin as their standard of value. And there was some testimony, also drawn out under like objection and exception, relating to a difference in the value of the property in case United States legal tender notes should be taken as the standard.

At the close of the testimony, the court, at the request of the district attorney, and under objection and exception on

the part of defendant, among other instructions embodying a similar idea, gave the following:

"That the term 'the value of fifty dollars or more' used in the statute defining the crime of grand larceny means of the value of fifty dollars or more in any lawful money of the United States."

The grade of the crime was fixed by a statute of the state long prior to the passage of the legal tender act, and with reference to the money standard then established by law. Congress has not attempted to interfere with or change in any respects the legislation of the states upon the subject of crimes and punishments. It has created another kind of money to be used in the business transactions of the country, and made it a legal tender in payment of debts, etc. But this case involves no question of contract, or tender, and does not come within the purview of the act of Congress. The grade of the offense must be determined by the standard with reference to which it must be presumed to have been fixed by the legislature.

The jury found the defendant guilty of grand larceny, when there was testimony upon which, had it been believed, they might have found the value of the property to be less than fifty dollars estimated by the standard established by law at the time the act was passed. The jury, therefore, may have been misled by the instruction.

The judgment must be reversed and a new trial had, and it is so ordered.

We concur: Sanderson, C. J.; Shafter, J.; Rhodes, J.; Currey, J.

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RIDER, Appellant, v. MILLER, Respondent.

No. 533; July 17, 1865.

**Taxation—Public Lands—Presumption.**—For purposes of taxation there is no presumption of law that land occupied by private persons, assessed in due form by the proper officers as private property and sold for taxes, is a part of the public domain and not subject to taxation.

**Taxation—Public Land.—It is Insufficient Merely** to claim land as United States government land, and hence exempt from taxation; the person concerned must show the fact.

**Tax Sale.—A Tax Deed is Made by Statute Prima Facie Evidence** of title in the grantee.

APPEAL from Sixth Judicial District, Sacramento County.

Geo. Cadwalader for appellant; Moore & Alexander for respondent.

SAWYER, J.—This is an action to recover certain lots of land situated in the city of Sacramento. Plaintiff alleges title and an ouster. Defendant, after denying the allegations of the complaint, sets up the statute of limitations, and alleges title in himself. Plaintiff introduced a tax deed executed in pursuance of a sale for taxes, for the fiscal year 1859–60, and proved the possession of defendant for eleven years prior to the commencement of the suit. The defendant proved that during the time of his possession of the premises he was "claiming the same as United States government lands." This last proof of claiming the same as government lands was admitted under objection and exception on the part of the plaintiff on the ground that the evidence "was inadmissible under the answer, and immaterial, and not even tending to show that it was government land." This is all the evidence on the question, as to whether the land was a part of the public domain or not.

The second finding of the court is as follows: "That the land in dispute and described in said deed is a part of the public domain and is the property of the government of the United States." And the court finds as conclusion of law: "First. The premises in controversy in this action, being public land, are not subject to taxation, under the laws of the United States or of this state." "Second. The only title claimed by plaintiff in this case being based upon a sheriff's deed for taxes, and the land claimed being a part of the public domain, he has shown no right to said land, and no right to recover in this action."

Judgment was thereupon rendered for defendant.

Plaintiff moved for a new trial on the ground, among others, that the evidence was insufficient to sustain the finding that the land in question is a part of the public domain. And we think it insufficient in this respect. For the purposes of taxation there is no presumption of law that land in occupation of private parties assessed as private property in due form by the proper officers, and sold for taxes is a part of the public

domain, and not subject to taxation. Possession is evidence of title. The tax deed is by statute made "prima facie evidence of title in the grantee." If the lands were not in fact subject to taxation, this is an exception to the general rule, and the party relying upon the exception must under the statute show affirmatively that he is within it. Being in the possession of the land and prima facie the owner, if it is in fact public land, and, therefore, not subject to taxation, he must show it; and testimony that the party is merely "claiming the same as United States government land" is insufficient to overthrow the prima facie case made by the possession and tax deed. This being the only testimony on the point, the evidence, in our opinion, is insufficient to sustain the finding upon which the judgment is based.

There does not seem to be any question made on the sufficiency of the tax deed. The respondent has not thought proper to file any brief, or points, and we have, therefore, decided the case without any aid from counsel on that side.

Judgment reversed and new trial ordered.

We concur: Sanderson, C. J.; Shafter, J.

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PEOPLE, Respondent, v. WM. MAC et al., Appellants.

No. 710; November 6, 1865.

**Taxation.—Public Lands are not Subject to Taxation, and an act of the legislature, intended to cure an ineffective assessment of them, is in itself ineffective.**

APPEAL from Eleventh Judicial District, El Dorado County.

*J. J.* Williams for respondent; G. E. Williams for appellants.

SHAFTER, J.—This is an action to collect delinquent taxes. It appears that twelve hundred acres of public land were listed to the defendant in 1863, at a valuation of five hundred

dollars, as fixed by the assessor. On the 27th of October, 1863, the defendant paid the full amount of his taxes on that valuation, and took the collector's receipt. It appears by the assessment-roll that the valuation of the lands was raised thereafter by the board of equalization to four thousand dollars, and the tax in controversy (sixty-seven dollars and twenty cents) was assessed upon the difference between the two valuations.

Public lands are not subject to taxation, and it follows that the act of 1864 could not have had the effect to cure the assessment.

Judgment reversed.

We concur: Sawyer, J.; Sanderson, C. J.; Rhodes, J.

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## HARPER, Administrator, Appellant, v. MINOR et al., Respondents.

No. 722; November 6, 1865.

**Appeal.—By Failing to File the Notice of Appeal before the lapse of the statutory time for filing it, a party who would appeal from a judgment loses the right.**

**Appeal—Order Denying New Trial—Specification of Grounds.—On appeal from an order denying a motion for a new trial, the statement in the record must contain a specification of the grounds the motion was based on; a setting forth of the points in a general way in the motion itself will not suffice.**

APPEAL from Third Judicial District, Santa Clara County.

J. B. Hart for appellant; W. T. Wallace for respondents.

SHAFTER, J.—The appeal is from the judgment and from an order overruling the motion for a new trial.

The judgment was rendered January 13, 1864, and the notice of appeal was not filed until after the right of appeal had been lost by lapse of time.

As to the appeal from the order, it is not supported by a statement which we are at liberty to notice. The statement

in the record contains no specification of grounds explaining the several points of objection set forth in a general way in the notice of motion. We do not consider that this radical defect in the statement is cured by the assignments in the exceptions taken to the findings. The papers are not identical but distinct from each other; and each has its separate place and office in the course of the proceedings, whether at law or in equity. But in this case the special assignments in the exceptions to the findings are unavailable even in that connection. And if bad for the very purpose for which they were made, it would seem to furnish an additional reason why they should not be treated as good for another and distinct purpose to which they have no apparent relation.

Judgment and order affirmed.

We concur: Sawyer, J.; Sanderson, C. J.; Currey, J.

Mr. Justice Rhodes, being disqualified, did not sit in this cause.

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## LIGHTSTONE, Administrator of JONES, Respondent, v. SCULL, Appellant.

No. 700; November 6, 1865.

**Administrator—Appointment—Residence of Decedent.**—That the probate court may have jurisdiction to appoint an administrator, when the words in the petition lack precision as to where the deceased resided, the court may satisfy itself of the fact of residence otherwise than from the petition.

**Administrator—Appointment—Residence of Decedent.**—When it appears from an order of the probate court appointing an administrator, even though not by direct statement, that the residence of the deceased at the time he died had been proved to be in the county, residence is sufficiently shown as a jurisdictional fact.

APPEAL from Third Judicial District, Santa Clara County.

F. Hall for respondent; S. O. Houghton for appellant.

SAWYER, J.—The only question in this case is as to whether the record of the probate court shows facts sufficient

to give that court jurisdiction to appoint an administrator. The averment in the petition, "that Thomas Jones, formerly a resident of Santa Clara county, is now deceased. That he temporarily left said county sometime in 1859 and went to the mountains," is certainly a very loose mode of alleging that Jones was a resident of Santa Clara county at the time of his death. But whether a sufficient averment or not, we think it appears in the order appointing the administrator that this "jurisdictional fact" was "afterward proved in the course of the administration" sufficiently to satisfy the requirements of section 58 of the Probate Act, so that "the decree of administration and subsequent proceedings shall not, on account of such want of jurisdictional averments, be held void." The order appointing the administrator recites that it had been proved, "that the said Thomas Jones died intestate in the ———— county of this state of California, 1858, and that he was a resident of said county of Santa Clara and state aforesaid." There is here also, it is true, a want of precision in the language used—a fault too common in the judicial proceedings in this state—but we think the construction of the clause, that "he was a resident of said county of Santa Clara," in connection with and immediately following the statement that he died intestate in 1858, must be, that he was a resident of said county at the time mentioned—the time of his decease in 1858.

Judgment affirmed.

We concur: Sanderson, C. J.; Shafter, J.; Rhodes, J.; Currey, J.

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ADOLPH A. SON, Respondent, v. BROPHY, Appellant.

No. 619; November 6, 1865.

**Bills and Notes—Bona Fide Holder—Counterclaim.**—In an action on a note, indorsed in blank and transferred for value before maturity to the plaintiff, the maker cannot set up by way of counterclaim a claim against an intermediate holder of the note assigned to the defendant after the note came into the plaintiff's hands.

SHAFTER, J.—The note for the collection of which this action is brought was executed by defendant payable to

Robert Smith or order, and was delivered by Smith, indorsed in blank, to Albert Son, the plaintiff's brother, on the 23d of February, 1864, the day of its date. Albert delivered the note on the same day to one Brown, the plaintiff's agent. The consideration of the note was a loan of five hundred dollars negotiated by Albert Son during the absence of the plaintiff from the state. The note fell due on the 22d of March ensuing its date.

The defendant, two days before the note matured, took an assignment from Smith of a claim in his favor against Albert Son, growing out of a certain broker's contract between the two, which claim was set up by the defendant in his answer by way of setoff. The plea alleges that the note became the property of Albert Son by delivery to him by the payee the day it bears date, and that Albert transferred it to the plaintiff after the assignment of the counterclaim to the defendant and subsequent to the maturity of the note. All of the evidence offered by the defendant upon the subject of Albert's relations to the note was received, but the court has found the money loaned was the property of the plaintiff; that the note was taken for his advantage, and that the legal title to it vested in him by direct delivery from Smith under the blank indorsement. On all these points there was little or no conflict in the testimony. The findings are, of course, fatal to the counterclaim as presented in the answer.

The case is argued for the appellant upon the hypothesis that the evidence tended to prove that the plaintiff had allowed his brother to deal with his, the plaintiff's, property as his own, and to acquire a false credit thereby, and that the defendant on the faith of these appearances, invested in the claim assigned to him by Smith, with a view to offset it against the note; but the evidence of the defendant had no tendency to prove such a state of facts, and even if it had, it is very doubtful whether it could be considered as supporting the counterclaim of the answer.

Judgment affirmed.

We concur: Sanderson, C. J.; Sawyer, J.; Rhodes, J.; Currey, J.

BOREL, Appellant, v. FELLOWS QUARTZ MINING COMPANY, Respondent.

No. 716; November 6, 1865.

**Evidence.—A Resolution of a Board of Directors,** or of stockholders, to reimburse a named person for the amount expended by him in developing a mine may be an admission of indebtedness, but it is not sufficient to support a count in a complaint "for money loaned" the company.

**Evidence.—A Resolution of a Board of Directors,** or of stockholders, appropriating a sum "not exceeding thirty thousand dollars" "from the first proceeds of the Fellows Mine" to reimburse, etc., is not evidence to be relied on by the person to be reimbursed in a suit by him, or his representatives, against the company to prove any particular sum to be due or the time when any money became due.

APPEAL from Fourth Judicial District, San Francisco County.

Sidney V. Smith for appellant; G. F. and W. A. Sharp for respondent.

SAWYER, J.—This is an appeal from a judgment of nonsuit. Clearly the evidence does not support the first count for money loaned to the company. The resolution appropriating a sum "not exceeding thirty thousand dollars," "from the first proceeds of the Fellows Mine," to reimburse the amount expended by Franconi in improving and developing the mine, can, at most, only be regarded as admitting an indebtedness payable out of the first proceeds of the mine, and the whole admission must be taken together. There is no evidence to show that the sum due was otherwise payable. But the resolution only appropriates a gross sum not exceeding the amount mentioned for the purpose designated, without pretending to aver that the full amount specified was actually due. The subsequent resolution of the stockholders introduced in evidence after reciting that the company "is indebted to L. Franconi for building a mill and improving the mine," authorizes the appointment of an agent to examine and report to the stockholders as to the condition of the mill and appurtenances and make and return an inventory of the

property, etc., and authorizes the trustees to accept the same—the mill evidently—and to issue notes of the company in favor of L. Franconi payable to the order of Mathew Crooks and A. Borel in a sum not exceeding sixty thousand dollars, and provides that "the above amount or so much as may be necessary be disbursed under the direction of Mathew Crooks and A. Borel to pay existing debts and those accruing during the ensuing nine months, etc." These resolutions recite an indebtedness to Franconi, but they give no clue to the amount. Whatever the amount, they, together with other existing debts, and debts to accrue during the ensuing nine months, were to be paid out of the said sum of sixty thousand dollars. Admitting that these various resolutions of the trustees and stockholders together show that there was a legal liability of some kind, there is nothing to enable the court to guess even at the amount. It was impossible upon the evidence to say that the plaintiffs were entitled to recover any particular sum. But it evidently was not contemplated by the resolutions that the notes should be issued for the payment of Franconi until after the acceptance of the mill. The resolution is not therefore a recognition of the demand until an acceptance, and no acceptance or other proceeding is shown. If the resolutions of the stockholders are regarded as recognizing the action of the trustees appropriating a sum not exceeding thirty thousand dollars as claimed by appellant, then the ratification is, according to the terms of that resolution, payable out of the first proceeds of the mine only, and the amount to be paid is also still left indefinite. It does not appear that there was any proceeds of the mine.

We think the judgment should be affirmed, and it is so ordered.

We concur: Sanderson, C. J.; Shafter, J.; Currey, J.; Rhodes, J.

JOSEPH WALKUP et al., Respondents, v. B. EVANS et al., Appellants.

No. 707; November 6, 1865.

**License—Restraining Acts Under.**—A license, as contradistinguished from an easement, furnishes no defense to a bill filed by the property holder to restrain the defendant as to an act in the future under the license.

The allegations of the complaint went to the following effect. The United States, by the act of September 4, 1841, donated to the state five hundred thousand acres of public land to be selected within the state limits, and the California legislature, by its act of May 3, 1852, and the later acts of April 30, 1857, April 23, 1858, and April 16, 1859, provided for such selection, the sale of the land in parcels, and the issue of patents to the purchasers; and that a part, describing it, of the land so selected was that involved in the present suit. One Smith Worden was the purchaser, and the state issued its patent for the land to him on December 9, 1859, six days after which Worden duly made a conveyance to the plaintiffs in fee. On December 1, 1860, the United States issued to the plaintiffs a patent for adjoining lands which, together with the other, were worth as much as five thousand dollars, being valuable as agricultural and timber holdings. In June, 1863, the defendants entered upon this land, the plaintiffs not consenting but remonstrating rather, and began to dig it up, defacing and mutilating it in one part and another with deep excavations and huge earth-heaps from the excavations, etc., in search of gold, as they professed, with the result that in those parts the land had been rendered worthless for agricultural purposes; besides which in the course of these operations they had destroyed much growing timber on the land. Already the defendants had caused injury to the land to the extent of a thousand dollars and, if they continued the operations, as they openly threatened to do, the injury would amount to complete destruction of all value in the land. The defendants were irresponsible persons, many of them Chinamen, had no fixed places of abode, refused to pay for the injury they had done, and had no property out of which

a judgment for damages could be collected. The prayer was for an injunction.

The defendants by their answer denied the plaintiffs' ownership of part of the land and alleged that the patents above mentioned had been procured by fraud; they denied that they had cut down any growing timber except just enough to use for firewood or that by any of their acts the value of the land had been diminished to an extent beyond one hundred dollars. They denied, moreover, that they were irresponsible, insolvent or unable to respond in damages. They averred, too, that all the land was mineral land, and so reserved and exempt from sale, entry, location or grant to either the state or an individual, and that the plaintiffs were aware of this at the time they assumed to acquire it. On their own part they averred a quiet and peaceable occupancy for mining purposes, by themselves and persons under whom they claimed, of a described portion of the land throughout a period of nine years past, all in accordance with the mining rules of the vicinage. They averred that they had made large expenditures of money in pushing their activities, of all which the plaintiffs had had full and timely notice; but that, so far from objecting to these activities, the plaintiffs expressly had told the defendants to go on with them, and, since the defendants had expended at least twenty thousand dollars upon their mining claims, making these valuable features of the property, the plaintiffs were estopped.

At the trial the plaintiffs rested after producing the two patents in evidence. The defendants offered to prove declarations by the plaintiffs, made before their acquiring title, to show an intention on their part not to interfere with the defendants' mining work. The offer was objected to and the objection sustained. Offer was next made to prove similar declarations by the plaintiffs made after their acquiring title, but it was not asserted, as it was not, indeed, in the case of the former offer, that the declarations were made to any of the defendants or within the hearing of any. This offer also was, on objection being made, rejected. A motion was then made for leave to amend the answer so as to show that these declarations had been made with intent to deceive the defendants and induce them to make the expenditure, and that the defendants had been so deceived and induced. The motion

was objected to and denied. The point as to the lands being mineral in character was not urged.

Tuttle & Fellows for respondents; Tweed & Craig for appellants.

SAWYER, J.—There was no error in excluding the testimony offered and rejected. It would not have constituted a defense if admitted, and was, therefore, immaterial. And for the same reason there was no error in refusing to allow defendants to amend their answer. They did not propose to show any agreement between plaintiff and defendants, but public declarations of plaintiff not even claimed to have been made to defendants or acted on by them.

Judgment affirmed.

We concur: Sanderson, C. J.; Currey, J.; Rhodes, J.

SHAFTER, J.—In Foot v. New Haven & Northampton Co., 23 Conn. 233, the plaintiff gave the defendants license to erect a culvert on their land to turn a current of water over his land, which the defendants did at their own expense, and the license so given was held to be a revocable one.

In Jamieson v. Millemann, 3 Duer (N. Y.), 255, the plaintiff was lessee of land, of which the defendant had the reversion, and gave the defendant license to enter and erect an ice-house on the same. After he had partly completed it, the plaintiff forbade his entering, and thereby revoked the license. It was held that he might do so without tendering any amends to the defendant for the moneys he had expended. And see Cook v. Stearns, 11 Mass. 533; Cowles v. Kidder, 4 Fost. (N. H.) 364, 57 Am. Dec. 287; Stevens v. Stevens, 11 Met. 251, 45 Am. Dec. 203; Mumford v. Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60, and Coleman v. Foster, 37 Eng. L. & Eq. 489. These cases are all based upon the principle that neither a freehold interest nor an easement in lands can be created except by deed or prescription. A license will protect the licensee against damages resulting from acts done under it but furnishes no defense to a bill filed to restrain him as to the future. I concur in the judgment.

PEOPLE, Respondent, v. JOHN McFLYNN, Appellant.

No. 682; November 7, 1865.

**Witnesses—Husband and Wife.—The Act of Legislature authorizing a woman to be a witness for or against her husband relates to civil, and not criminal, cases.**

APPEAL from Placer County.

Attorney General for respondent; J. Hamilton for appellant.

SAWYER, J.—The indictment is sufficient: People v. Sanksley, and cases cited. We find no error in the charge of the court, or instructions given at request of counsel. The act of 1863 (Laws 1863, p. 771) authorizing the wife to be a witness for or against the husband is an amendment to section 395 of the Civil Practice Act, and relates only to civil cases.

We think, however, that the evidence is insufficient to show that the branding of the cattle was done with intent to steal, and for this reason the judgment must be reversed and a new trial had, and it is so ordered.

We concur: Currey, J.; Rhodes, J.; Sanderson, C. J.

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RYER, Respondent, v. HICKS et al., Appellants.

No. 642; November 7, 1865.

**Appeal—Points not Urged by Appellant.—On appeal from the disposition of a motion for a new trial, when the sole ground for the motion, as specified in the statement, is the insufficiency of the evidence to justify the findings, the court is precluded from considering other points urged by the appellant.**

APPEAL from Fifth Judicial District, San Joaquin County.

Geo. A. Loughborough for respondent; Tyler & Cobb for appellants.

SAWYER, J.—We think the evidence supports the finding and judgment. The ground that the evidence is insufficient to justify the finding is the only one specified in the statement on motion for new trial, as required by section 195 of the Practice Act. For this reason we are precluded from a discussion of the other points made by appellants: Hutton v. Reed, 25 Cal. 478; Burnett v. Pacheco, 27 Cal. 410. We have, however, examined the elaborate brief of appellant, and if the questions raised were before us, we think there is nothing in them that would justify a reversal of the judgment.

Judgment affirmed.

We concur: Sanderson, C. J.; Shafter, J.; Currey, J.; Rhodes, J.

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MILES, Appellant, v. THORNE, Respondent.

No. 681; November 7, 1865.

**Partnership.—A Promise to Share a Road, Followed by a Refusal to execute the promise, discloses no evidence of a partnership.**

APPEAL from Third Judicial District, Alameda County.

J. B. Felton for appellant; Clark & Carpentier for respondent.

SAWYER, J.—This is an action for dissolution of an alleged partnership for an account.

It is insisted that judgment on the facts should have been for plaintiff. We think not. They do not show a partnership. The most that can be claimed for them is, that defendant verbally promised that plaintiff should have one-half the road, and then refused to execute the promise. This does not constitute a partnership.

Judgment affirmed.

We concur: Sanderson, C. J.; Shafter, J.; Currey, J.; Rhodes, J.

PEOPLE, Respondent, v. WM. HICKS et al., Appellants.

No. 684; November 7, 1865.

**Tax Sale.—A Tax Deed Describing the Property** conveyed as "an undivided interest in the," etc., is not bad for misdescription if otherwise it identifies the property, mentioning the record owner, whose interest was an undivided one, and the assessment to him.

APPEAL from Sixth Judicial District, Sacramento County.

M. M. Estee for respondent; Coffroth & Spaulding for appellants.

SAWYER, J.—This is an action to recover taxes. The question arises upon demurrer to the complaint, and the point relied on is, that the description "an undivided interest in the Chabolla Grant, etc.," is insufficient, because the amount of the undivided interest is not stated. The complaint also avers "that the said William Hicks was then and there the owner of, and that there was duly assessed to him, the above-described real estate, etc." The land thus appears to be an undivided interest in a certain grant, and Hicks is the owner of the interest assessed; that is to say, Hick's undivided interest in the grant is the land assessed for which the taxes are sought to be recovered. We think the description sufficient. The land is designated; the only difficulty is as to the amount of the interest, and that is shown to be the proportion owned by Hicks, be it more or less. It is certainly sufficient as to Hicks, and upon the whole we think sufficient to charge the real estate as a party.

Judgment affirmed.

We concur: Sanderson, C. J.; Shafter, J.

We dissent: Currey, J.; Rhodes, J.

JOHN D. HAVENS, Appellant, v. DALE et al., Respondents.

No. 582; November 9, 1865.

**Appeal—Dismissal Without Motion.**—An appeal may in all cases be dismissed, without a motion therefor first filed, where the appellant has no "case" on appeal, that is, no statement on appeal; and it is not claimed that there is error in the judgment-roll.

APPEAL from Twelfth Judicial District, San Mateo County.

A. Teague for appellant; C. N. Fox for respondents.

SHAFTER, J.—This is an appeal from a judgment in ejectment, and from an order denying a motion made by appellant for a new trial.

There is no statement on appeal, and it is not claimed that there is any error in the judgment-roll. The statement on motion for new trial contains no specification of grounds as required by the act of 1861, under which the motion and statement in support of it were made: Barrett v. Tewksbury, 15 Cal. 354.

It is not necessary that a respondent should move to dismiss under the thirteenth rule of the court, in a case where there is no statement which we are at liberty to notice. Where the objection is one "affecting the right of the appellant to be heard on the points of error assigned," a motion to dismiss must be made at the first term after the filing of the transcript; but in this case, no errors having been assigned, the defect in the proceedings is one to which the rule has no application. The difficulty is that the appellant has no "case" here on appeal: 15 Cal. 354.

Judgment affirmed.

We concur: Sanderson, C. J.; Sawyer, J.; Currey, J.; Rhodes, J.

WILLSON, Appellant, v. TRUEBODY, Respondent.

No. 205; November 13, 1865.

**Judgment—Res Judicata.—Where There are Two Judgments in Different Suits,** commenced at different times, between the same parties, involving the same subject matter, and determining the same points in different ways, the party prevailing in the first suit will be estopped by the judgment in the last; this judgment can operate as an estoppel, however, only upon those matters which were necessarily determined.

**Ejectment.—A Plaintiff in Ejectment must Recover, if at All,** only on the strength of his own title; and if he fails to show a right of possession in himself, it matters not whether the defendant has title or not.

**Vendor and Vendee—Transfer by Obligee in Bond to Convey.—** Where it appears, in a transaction relating to land, that the title was intended to remain in the obligor and that the instrument is merely a bond to convey when payments are made according to the conditions, the obligee can meantime transfer to a third person nothing but a right to be given a deed upon payment in full.

**Deed to Clear Title—Validity.—When One Yields a Large Consideration in Rents,** damages and costs for the purpose of clearing up his title, the deed, in the transaction, from the recipient of the consideration is not to be regarded as ineffective for the purpose merely because the subject matter is described as "a claim against the lot."

SAWYER, J.—This is an action to recover a lot on the corner of Washington street and Dunbar alley in San Francisco. The plaintiff's title is put in issue by the answer, and defendant also sets up title in himself.

On the twelfth day of June, 1849, the defendant Truebody—at that time the owner in fee—conveyed the lot in question to Edward E. Dunbar. Said Dunbar on the 18th of September, 1849, executed under seal a bond in the sum of twenty thousand dollars to one Domingo Guzman, "upon the following conditions, to wit: Whereas: I have this day sold unto the said Domingo Guzman a certain lot [describing lot in question] for the sum of ten thousand dollars to be paid as follows: [specifying the amount and time of payment of the several installments.] Now, therefore, if the said Domingo Guzman do pay, etc. . . . . in the manner and times aforesaid, etc., . . . . the said Dunbar hereby agrees to give him

a warranty deed for the above-described premises and upon the giving of such deed this instrument to be void, etc."; and let Guzman into possession under said bond, the first installment being payable, and, it is presumed, paid at the time of the execution of the instrument. On the 15th of November, 1849, the said Dunbar, by deed of that date, reciting that there was some seven thousand dollars purchase money still due from Guzman, assigned the said demand for purchase money, and conveyed all the right, title and interest of said Dunbar in and to said lot to said defendant, Truebody. On the 1st of April, 1850, said defendant, Truebody, and said Guzman accounted together concerning said purchase money, finding something upward of six thousand dollars still due, and upon said accounting said Guzman gave said Truebody his note for the amount found due, payable in ninety days, and on the giving of said note said Truebody indorsed upon said bond for deed in the possession of Guzman an agreement to extend the time of payment of said balance ninety days, reciting that the giving of said note was for balance of purchase money, and that said extension was in consideration of the giving of said note. On the 29th of June, 1850, the said Guzman, being still in the possession of the lot, by an instrument in writing under seal indorsed on said bond for deed, assigned, transferred and set over to Harvey Sparks all his right, title and interest in and to said bond, "and the property therein mentioned, together with all covenants and privileges therein expressed," and "delivered a possession of part of said land to said Sparks." Guzman and Sparks continued in possession by their tenants till September 9, 1850, on which day "said Sparks" indorsed on said bond an instrument in all respects similar to the last, in favor of Allen T. Willson and Jeremiah Clarke, and delivered possession of said lot to said Willson and Clarke, who continued in possession till April 22, 1851, on which day said Clarke executed a similar instrument in favor of said Willson, and delivered the exclusive possession of said lot to said Willson. None of these instruments were acknowledged or recorded. By an agreement in 1849—but whether verbal or in writing does not appear—between said A. T. Willson and a brother, sons of plaintiff, said brother bound himself and promised to pay and secure to the plaintiff as

much money, or money's worth, as said Allen T. Willson should give, convey or secure to her. In consideration of this promise of his said brother, said Allen T. Willson, on the 29th of October, 1851, executed a conveyance of the lot in question to plaintiff, and transmitted it by mail to her in New York, where she then and has ever since resided. In 1853, when said Allen T. was on a visit to his mother, the said plaintiff in New York, she handed the said deed to him to be brought back to California and recorded, where it was, some seven years afterward on the seventeenth day of April, 1860, recorded in the proper office. Under this deed plaintiff claims title.

On the twelfth day of July, 1850, said Truebody brought suit in the superior court of the city of San Francisco against said Guzman and Sparks, who were then in joint possession by their tenants by filing complaint, in which he set up the before-mentioned purchase by Guzman, and the subsequent transactions above stated down to and including the transfer to Sparks, and the tenancy under Guzman and Sparks of the other defendants, and praying a judgment for the amount of purchase money still due—then amounting to some seven thousand dollars—and for a sale of the lot and payment out of the proceeds. The defendants appeared and answered, said Willson and Clarke appearing and conducting the defense as their attorneys. On the 31st of January a judgment was entered for the amount due, and directing, in default of payment within thirty days, that all the right, title and interest of said Guzman in law and equity in said lot be sold by the sheriff, and for payment out of the proceeds. The lot was afterward sold by the sheriff under the judgment, March 28, 1851, to said Truebody for six thousand nine hundred dollars, said Willson and Clarke being present and bidding at the sale, but at that time giving no notice of any claim of their own. The sheriff executed a deed in pursuance of the sale dated March 29, 1851, which deed was duly acknowledged on the 5th and duly recorded on the 17th of April, 1851.

On the 15th of May, 1851, said Truebody instituted another action against one Jackson, a tenant of said Willson, said Willson, Clarke, Sparks and Guzman, in which he set out the former proceedings in the case of Truebody v. Guzman et al.,

the decree, sale, etc., the said assignment of Sparks to Willson and Clarke, and charging a fraudulent concealment of their claim by them, and averring the tenancy of Jacobson; and on the supposition that the former proceedings did not devest the equities of Sparks because the decree contained no specific provisions to that effect, asked that the judgment and proceedings thereon might be vacated, and for a new judgment and sale, and such other relief as the facts would justify. The cause having been tried before a jury, "a general verdict for plaintiff according to the complaint" was found. The jury also found among other things that "at the sale a deception was practiced on Truebody." Upon the pleadings, evidence and verdict the court dismissed the complaint, and plaintiff Truebody appealed. On appeal the late supreme court held that, on the facts of the case, the plaintiff, under his former decree, sale and conveyance, acquired a perfect title, and adjudged "that the entire legal and equitable title to the lot of ground and premises described in said complaint, to wit: [describing it] and the appurtenances thereunto belonging, is, and has been, since the date of the sheriff's sale to said complainant on the 28th day of March, 1851, and the sheriff's deed thereupon vested in the said complainant; and that neither the said Guzman, the said Sparks, the said Clarke, nor the said Willson, the said Jacobson, nor any other person claiming under them, has now, nor has had since the day of said sale and conveyance any right, title or interest in or to said lot of ground or said premises." It further adjudged that said premises be delivered up to the complainant and that a writ of possession be awarded. It was also ordered and adjudged that said defendant, Willson, the party holding possession and claiming title, account for the rents, issues and profits, and pay the costs of the litigation. On filing the remittitur in the court below, a writ was issued in pursuance of the said judgment, and the sheriff, in pursuance thereof, on the tenth day of September, 1852, put defendant, Truebody, in possession, and he has ever since continued in possession.

On the tenth day of November, 1852, the said Allen T. Willson executed in favor of said defendant Truebody a deed, whereby in consideration of the release by said Truebody "of all claims for damages and costs, rents and profits,

under the decree in the case of John Truebody v. H. M. Jacobson and Allen T. Willson" last above mentioned, he quitclaimed all his interest in a small lot in the rear of the lot in question and did "further release unto the said party of the second part (Truebody) all claims of the said party of the first part (Willson) against the lot" in question. This deed was duly recorded in the proper office on the 11th of November, 1852.

On the nineteenth day of July, 1851, the said Allen T. Willson instituted a suit in the superior court of the city of San Francisco, against said defendant Truebody, under the two hundred and fifty-fourth section of the Practice Act of 1851, by filing complaint, in which he avers that he "is the owner and in possession of" the lot in question; "that the said defendant claims an estate or an interest therein adverse to the said plaintiff, which said claim is without foundation," and asks that judgment may be pronounced that defendant has no such estate or interest therein. Defendant answered, and the court held, that the answer denied no material issue of the complaint, and adjudged that defendant, Truebody, "has no estate or interest in, nor lien, nor encumbrance on the lot of land described in the complaint," and that plaintiff recover his costs. This is the entire point adjudged in terms.

The monthly rent since September 10, 1852, is two hundred dollars. Defendant Truebody has put improvements to the value of sixteen thousand one hundred and twenty-five dollars on the lot. There are some other facts found not necessary to notice. On the facts found the district court was of the opinion that plaintiff was not entitled to recover, and judgment was entered for defendant.

The plaintiff's counsel insists that defendant is estopped by the judgment in the last-mentioned case of Willson v. Truebody from inquiring into the state of the title anterior to the date of the filing of the complaint in that suit; and that he cannot avail himself of the judgment in Truebody v. Jacobson et al., set up by way of estoppel in his answer. We are inclined to think that, where there are two judgments in different suits, commenced at different times, between the same parties involving the same subject matter, and determining the same points in different ways, that the party pre-

vailing in the first suit will be estopped by the judgment in the last. It was so held in Cooley v. Brayton, 16 Iowa, 17. But it is unnecessary to determine the question now, for, under our view of this case, conceding this to be so, and that the judgment is presented in the record in such a way as to be available to the plaintiff, still the questions adjudicated are insufficient to authorize a recovery. The judgment can operate as an estoppel only upon those matters which were necessarily determined. Now, in the case of Willson v. Truebody, Willson's title was not determined, as the judgment distinctly shows. The plaintiff Willson avers in his complaint "that he is the owner and in possession" of the lot. The defendant Truebody answers "that the plaintiff is not the owner of the lot as he states in his complaint, and this he prays may be inquired of by the court." There is a direct issue on the ownership, or, to give the allegation the most extended signification, the title of Willson, and this is the only issue made on the allegations of the complaint. The court in the inducement to the judgment recites that, "all and singular the premises being considered and understood, it appears to the court now here that the answer filed in this cause, and the matters and things therein alleged presents no material issue of facts triable before the court or jury, and do not, and would not if true and fully proved and established, bar or preclude the said plaintiff having and maintaining his said action, nor be any legal cause why the judgment and decree prayed for in the complaint in this cause should not be rendered. Wherefore, etc., . . . . it is considered, ordered, adjudged and decreed, that said John Truebody has no estate or interest in, nor lien nor encumbrance on, the lot," etc., saying nothing at all about Willson's title.

The court here determined that it was immaterial to inquire whether Willson had title or not, and refused to try that issue. Section 254 of the Practice Act under which the action was brought provides that it "may be brought by any person in possession, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest," not the claim or title of the person in possession. The judge who tried the case held that it was enough that Willson was actually in possession, whether he had any right there or not,

and that Truebody out of possession set up some claim without foundation, and whether the court was right or not in this construction of the law, these were the only questions determined, and the only points upon which the judgment can operate as an estoppel.

But subsequently, Willson was turned out, and Truebody put in possession under process issued in pursuance of the judgment of the supreme court in favor of the latter against the former in a suit commenced before said suit of Willson v. Truebody. Willson's possession was thereby rightfully terminated, and Truebody came properly into possession, and he has remained in possession ever since. The plaintiff must recover, if at all, upon the strength of her own title, and if she fails to show a right of possession in herself, it matters not whether Truebody has any title or not. If neither party had title the defendant must prevail. Plaintiff has no title unless she acquired a title from said A. T. Willson through the before-mentioned deed of October 29, 1851, and as Willson's title was not determined by the said judgment in the case of Willson v. Truebody, her title can derive no support by way of estoppel from that judgment. We are, therefore, thrown back upon the question as to whether Willson did in fact have any title at the time he conveyed to his mother, the present plaintiff.

If said Willson had any title at all, he had it at the time said suit of Truebody v. Jacobson et al. was commenced, May 15, 1851, for he is not shown to have acquired any title since that time. But as we have already seen, it was in that case finally adjudged and decreed "that the legal and equitable title to the lot" in question was, and had been "since the date of the sheriff's sale to the complainant (Truebody) on the 28th of March, 1851, and the sheriff's deed thereupon vested in the said complainant (Truebody, defendant herein), and that neither the said Guzman, the said Sparks, the said Clarke, nor the said Willson, the said Jacobson nor any other person claiming under them, has now, had then, nor had since the day of said sale and conveyance any right, title or interest in or to said lot of ground or said premises." It is here adjudged in express terms, not only that at the commencement of that suit Willson had not, but that Truebody had, the title.

It may be that Truebody parted with his title to a third party subsequent to the commencement of this suit and prior to the commencement of the said suit to determine Truebody's adverse claim by Willson against Truebody, so that, at the time of the institution of the latter suit neither Willson nor Truebody had title. If so there is no inconsistency whatever between the two judgments, and it only appears from the two records taken together—nothing further having been shown,—that at the time of the institution of the last suit neither party had title.

It is contended on behalf of appellant that she is not estopped by this determination in Truebody v. Willson and Jacobson to assert title in Willson, and deny title in Truebody at the date of the commencement of the suit; but if estopped that the matter of estoppel is not well pleaded and for that reason not available. We do not now perceive any good ground for not holding this determination conclusive as to the rights of Willson and Truebody at that time. The facts were fully presented in the complaint and put in issue by the pleadings, and found according to the allegations of the complaint. It is true the plaintiff supposed that upon the facts he had no title, and his prayer for specific relief was based upon that idea, but he also prayed such other relief as in equity he might be entitled to upon the facts. The supreme court on appeal held that he was mistaken in supposing that he took no title by the previous proceedings, and that he did acquire a perfect title, both legal and equitable; that Willson had none and so expressly adjudged. The court had jurisdiction of the appeal—of the subject matter. It had the facts before it in the record and determined the matter, and, as a part of the relief granted, adjudged where the title lay. In some particulars we are not prepared to say that the court did not take a short cut to the goal of justice, nor are we prepared to say that they did not reach the goal by the path pursued.

There is a question made upon the authority of the court to reverse or modify a judgment of a lower court entered by consent. The judgment-roll did not show a judgment by consent. The question whether it was by consent or not was raised on affidavits and presented by a bill of exceptions. The court having jurisdiction of the appeal, and jurisdiction

to determine whether there was a judgment by consent, or such a judgment as would for any reason justify a reversal, determined that question, and whether erroneous or not we have no jurisdiction in this proceeding to review its action. We are of opinion, however, that it was not a judgment by consent in the sense claimed. But conceding that these matters are not well pleaded or for any reason are not available in this action by way of set-off, still the decisions in Truebody v. Jackson et al. are authorities that on the precise state of facts presented by this record Willson, on the 15th of May, 1851, had no title, and that Truebody had; and unless overruled they must control the decision of this case as authorities. The first decision was rendered at the January term, 1852, in which the court said: "The purchase of the property mentioned in the bill by the plaintiff from Dunbar gave him the legal title. His purchase at the sale, made under the decree rendered in the action which is referred to in the bill, invested him with the equity. So that, as appears from his own statements, he has a complete investiture of the legal and equitable title, as full as it could be derived from Dunbar, the first owner." 2 Cal. 85; and on this ground the court denies the plaintiff any relief because he does not require any. A rehearing was granted, the cause elaborately reargued, and it was again held that Truebody took title discharged of the vendee's equities under the sale on the prior judgment, and the court, instead of turning the plaintiff out of court, on the ground that he required no relief, gave effect to their opinion by entering a judgment granting relief in accordance with the points determined: 2 Cal. 288. The facts now shown by the record in this case affecting the question in no respect differ from the facts appearing in that case.

Of course, if Willson had no title, his mother, the present plaintiff, took none by his conveyance, and on this view, the question of notice of his pendens raised has no application. Truebody's conveyance under the sheriff's sale was on record at the time of the conveyance to her. Without regard to the doctrine of res adjudicata the same result must follow upon the same state of facts.

Without relying upon Truebody v. Jackson as authority, or upon res adjudicata as an original question, in our judgment, the legal title never passed to Guzman. The authority

cited from the civil law by appellant's counsel has no application to the question under consideration. It refers to points wherein the law supplies the rule, where no specific provision is made, or intent of the parties manifested in the contract itself. The question is, not what contract the law made for the parties when they omitted to manifest their intention by express provisions, but what contract did they make for themselves. The civil law was undoubtedly in force at the time the contract was made. But when the contract itself is lawful, the civil law, as well as the common law, gave effect to the contract made as manifested in the stipulation of the parties.

In Domat's Civil Law—an authority cited by appellant—it is said: "The contract of sale, as all other contracts, forms three sorts of engagements. The first is of those which are expressed in the contract; the second, of those which are the natural consequences of the sale, although the contract makes no mention of them; and the third is of such engagements as the laws, customs and usages of the country have established. The first of these three sorts of engagements reaches to all the particular covenants, and to all the different pacts, which may be added to the contract of sale, such as conditions, clauses of nullity in default of payment, the right of redemption, and others of the like nature. The second sort of engagements, which are the natural consequences of the contract of sale, comprehends those under which the seller may be to the buyer, and the buyer to the seller, although the contract makes no mention of them. These engagements oblige the parties in the same manner as the contract itself, of which they are consequences": 1 Dom. Civil Law by Cushing, 198, pt. 1, bk. 1, tit. 2, sec. 1, arts. 5–7. And again (Id., p. 217, sec. 6, art. 1): "We may add to the contract of sale, as well as to all other contracts, all manner of covenants and pactions that are lawful, such as conditions, clauses of nullity, a power of redemption and others."

From these citations it appears that where the contract is silent the law itself supplies certain conditions, but that such lawful special covenants may be made, enlarging or restricting the rights of the parties, as their interests may seem to dictate. And in construing a contract the object must be to ascertain from its provisions the intent of the parties, and to

give effect to that intent. The rule of construction under the same law is: "If the words of a covenant appear to be contrary to the intention of the contractors, which is otherwise evident, we must follow this intention, rather than the words": Id., p. 168, tit. 1, sec. 2, art. 11. Now, in the light of these principles, what is the intention of the parties with respect to transmitting the title manifested by the bond from Dunbar to Guzman? It is to be remarked that the instrument is one in form and the language used not known to the civil law. It is manifestly a common-law instrument, both in form, and the language employed. But the language used and form adopted were only used for the purpose of expressing the intent—the contract of the parties; and we must read it for the purpose only of ascertaining that intent, and when ascertained the law then in force would give effect to such intent. Had the instrument been executed in any state where the common law prevails, there could not be a question that no intent is manifested to transfer the title by the instrument. Clearly, it would appear that the title was intended to remain in the obligor, and that the instrument is simply a bond to convey the title when the payments are made according to the conditions. And this intent is manifest from the language of the instrument. The parties have used a form of contract well known in common-law countries, and not employed in contracts under the civil law, and must be presumed to have intended that it should be construed in the same manner it would be where ordinarily used. It is claimed that the agreement "to give a warranty deed" was not intended as an agreement to convey, but only to warrant a title already passed. If this were so, it amounted to nothing, as under the civil law the general warranty was attached to every sale by the law itself, unless there was a special restriction, and Guzman already had by the sale all that the conditions called for, and there was no occasion for any further assurance.

Says Domat: "Warranty in law, or natural warranty, is the security which every seller is bound to give for maintaining the buyer in the free possession and enjoyment of the thing sold; and for putting a stop to evictions, and other troubles that shall be given to the buyer by any person whatsoever, who shall pretend either a right of property or any other

right in the thing sold, by which the right which ought naturally to be acquired by the sale would be diminished. And the seller is obliged to this warranty although it be not stipulated by covenant. Warranty by deed, or covenant, is the security which the seller promises, either greater or lesser than what he is bound to by law, according as the parties have agreed between themselves. Thus, they may add to the warranty in law; as if it be agreed that the seller should warrant the buyer against the act of the sovereign. And they may likewise restrain the warranty in law; as if it be agreed that the seller should only warrant against his own proper act, and not against the rights of other persons, or that he shall only restore the price in case of eviction, and not the damages. And all these agreements have their justice, in that the buyers purchase at a cheaper or dearer rate, or upon other views; and in that the purchaser buys in effect only what is sold, and such as the seller is willing to warrant": Id., 231, tit. 2, sec. 10, arts. 6, 7.

There is no agreement in this instrument for a special warranty enlarging or restricting the ordinary general warranty, which, under the law, every sale carried with it without express covenant, and upon the theory of the appellant, Dunbar's covenants in the bond were wholly inoperative, so far as agreeing to convey anything valuable to Guzman is concerned. Evidently it was the intention of the parties to stipulate for something valuable—a conveyance of the title, which they supposed remained in Dunbar. We are satisfied that under this agreement the title remained in Dunbar. No title, therefore, passed to his assignees, or to the plaintiff, and there was a breach of condition on their part by failing to pay the purchase money according to the terms of the bond.

On still another ground the judgment of the court below should be sustained. A. T. Willson by quitclaim deed released to Truebody the lot in question on the 18th of November, 1854—subsequent to all of the judicial proceedings found in the record, which deed was duly recorded November 11, 1854. It is now insisted that the words "release" "all claims of the party of the first part against the lot," do not carry a claim to title, but only claims against it short of title in the nature of liens to secure money demands. This construc-

tion of the deed, when read in connection with the surrounding circumstances, seems to us preposterous. We should naturally suppose that Truebody, in yielding a large consideration in rents, damages and costs for the purpose of clearing up his title, while obtaining a release of other claims of the same party to the same land, would not fail to put an extinguisher upon a "claim against the lot" which he had pursued through years of expensive litigation, and which by unrecorded and undiscoverable assignments had repeatedly, as contended, eluded his grasp. And we have no doubt he thought he had at last succeeded. We also think the language of the deed accomplished the object, unless defeated by another conveyance which had not even yet and which did not for years afterward come to light—the conveyance to the plaintiff of October 29, 1851. But this deed was not recorded till April 17, 1860, since the commencement of this suit and nearly six years after the record of Truebody's conveyance from the same grantor, during all of which time Truebody was in quiet possession, making valuable improvements on the land. We have before held that a quitclaim deed passes any title which the grantor is at the time competent to convey, and we think such deeds within the provisions of the recording act, and that they will prevail in favor of purchasers for a valuable consideration without notice against prior unrecorded conveyances. With respect to this conveyance, the appellant makes some points on defects in the findings. But the findings were filed since the passage of the act of 1861, providing that a judgment shall not be reversed for want of findings, or for defects in findings. There was no exception by appellant as provided by the act for defects, and as we have often held under this act, where no exceptions for defects have been taken, it must be presumed that the facts found at the trial, if they had been stated, would support the judgment entered by the court.

We find no other material points of sufficient plausibility to require discussion.

Judgment affirmed.

I concur: Sanderson, C. J.

I concur in the judgment: Shafter, J.

RHODES, J.—I concur in the affirmance of the judgment upon all the grounds expressed in the opinion, except that in relation to the release executed by Willson to Truebody, and in respect to it, I am not prepared to say that its terms are sufficient to pass any title in or to the lot.

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DILLON et al., Respondents, v. KELLY, Appellant.

No. 845; November 15, 1865.

**Appeal—Failure to Prosecute—Damages or Penalty.**—After an appeal had been perfected and then allowed to rest for two terms unprosecuted, the judgment appealed from may, on motion by the respondent, be affirmed with damages as for an appeal frivolous and intended for delay only.

APPEAL from Fifth Judicial District, San Joaquin County.

Tyler & Cobb for respondents; Budd & Carr for appellant.

SAWYER, J.—The appeal in this case was perfected May 11, 1865, in time to be docketed in this court for the July term. Two terms passed without any steps having been taken by appellant to prosecute his appeal. The respondent has now filed the transcript and submitted the cause with a request that the judgment be affirmed with damages on the ground that the appeal was taken for delay. We have examined the transcript and are satisfied that the appeal is frivolous and intended for delay.

Judgment affirmed, with fifteen per cent damages.

We concur: Shafter, J.; Currey, J.; Rhodes, J.

ELZE, Appellant, v. OHM et al., Respondents.

No. 753; December 27, 1865.

**Deed—Promise to Reconvey.—An Instrument in Terms a Deed of Warranty,** but given on an express promise by the grantee to redeed at any time within one year therefrom on request by the grantor and a tender back of the consideration, is, in default of such request and tender within six years, to be regarded as a conveyance of the fee.

APPEAL from Fifteenth Judicial District, San Francisco County.

The suit was ejectment. The complaint was filed June 1, 1864, and in it the plaintiff alleged that on June 5, 1861, he had possessed and had been entitled to the possession of a described lot of ground in San Francisco; he alleged ouster and ejectment by the defendants on June 6, 1861, while he had so possessed, and unlawful detention of the premises from him, to his damage in the sum of five thousand dollars; also that the annual rents and profits of the premises were three thousand dollars in value, and that by the unlawful ouster he had suffered in that connection a loss of nine thousand dollars in addition to the other sum. These allegations were all denied in the answer. A motion was made for leave to amend the answer by setting up the statute of limitations as a bar to recovery, which motion was granted, the court refusing to impose as terms the condition that the plaintiff be allowed to amend the complaint by adding allegations to the effect that the defendant Ohm had entered as a mortgagee and ever since his entry had been receiving the rents and profits, by adding also an offer to pay the mortgage indebtedness, and by adding a prayer for an accounting.

At the trial the plaintiff proved a grant of the premises to him in 1849 and rested. The defendants rested after putting in evidence an instrument in writing, in form a deed of warranty, executed by Elze and in favor of Ohm and dated September 30, 1857. In rebuttal Elze then testified orally that the transaction was one of mortgage, notwithstanding the form of the instrument, and produced a written instrument, of even date with the other; an express promise to reconvey on

request and return of the money loaned within a year with interest. He testified to departing for South America soon after the transaction and being absent until October, 1863. Correspondence between the parties was introduced on both sides. Letters from Elze to Ohm of dates toward the end of the year given showed there was no prospect of a return of the loan, the writer conceding that all rights of his must expire immediately. Throughout nearly five years after that Ohm wrote to Elze frequently, but received no answer until in 1863 sometime he learned by chance that Elze was in the east and so addressed a letter to him at New York. In an answer to this letter Elze wrote, under date of June 3, 1863, "For the real estate formerly owned by me I can of course, advance no particular claim, for the time of the mutual contract is passed, on account of nonpayment, and therefore forfeited." Meantime Ohm had spent a great deal of money improving the property. There was much evidence introduced at the trial and the findings were for the defendant.

Zabriskie & Wright for appellant; Hastings & Taylor for respondents.

SAWYER, J.—We have examined the evidence in this case, and are satisfied with the finding of the court to the effect that the transaction between the plaintiff and defendant on the 30th of September, 1857, was designed to be an absolute sale, and not a mortgage.

The objection to allowing the amendment setting up the statute of limitations without imposing the terms insisted on by the plaintiff, conceding it to be valid for the purposes of the decision, became immaterial upon the view taken by the court on the main question of fact in the case. The evidence admitted under objection, if erroneously admitted, could not have influenced the findings of the court. The judgment and the order denying a new trial are affirmed.

We concur: Sanderson, C. J.; Shafter, J.; Currey, J.

[illegible]

[illegible]

**Appeal—Sufficiency of Evidence to Sustain Findings.**—The supreme court will not, in a [illegible] case, weigh the evidence at the trial, in order to see if the facts upon which the findings seem to be contrary to the weight of the evidence.

APPEAL from a [illegible] Court, San Francisco County.

[illegible] for respondent; W. H. L. Barnes for appellants.

SHAFTER, J.—The only question in this case is whether the evidence is sufficient to justify the findings. It may be conceded that the findings are contrary to the weight of the evidence, but the case is not one in which under the settled [illegible] of this court we can grant a new trial.

Judgment affirmed.

We concur: Rhodes, J.; Sanderson, J.; Sawyer, J.

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BOARD OF EDUCATION OF THE CITY AND COUNTY OF SAN FRANCISCO, Appellant, v. W. H. THORPE, Respondent.

No. 715: February 5, 1866.

**Ejectment—Purchaser Pending Action—Relief from Judgment.**—Where a suit has been brought for the recovery of real estate, a purchaser from the defendant before any trial has been had cannot let the suit go to trial and after judgment for the plaintiff seek in equity to have the judgment annulled on the ground of surprise.

**Ejectment—Sale Pending Action—Defense by Purchaser.**—Where a suit has been brought for the recovery of real estate, a purchaser from the defendant before any trial is had has no right to look to the vendor to continue the defense of the suit, since by the purchase such defense has become his own concern.

**Ejectment—Sale Pending Action—Counsel for Defendant.**—Where suit has been brought for the recovery of real estate, and a person purchases from the defendant before any trial is had, counsel employed by such defendant to defend the suit have a right to assume that they have been discharged by the sale.

**Ejectment—Sale Pending Action—Relief from Judgment.**—Where suit has been brought for the recovery of real estate and a person purchases from the defendant before trial is had, if, innocently relying on his vendor to continue defending the suit, such purchaser allows the plaintiff to take judgment, his remedy, provided he has any at all, is by motion for a new trial made within statutory time after the judgment.

APPEAL from Fourth Judicial District, San Francisco County.

SANDERSON, J.—This is an appeal from an order denying a motion to dissolve an injunction. The motion was made on the complaint and answer unaccompanied by any affidavits upon either side.

The action was brought to restrain the defendant by injunction from enforcing, by execution or otherwise, a certain judgment, which he had obtained in an action of ejectment against the plaintiff's grantors, and to open and set the same aside, or, in other words, to obtain a new trial in that action.

The facts as detailed in the complaint are substantially as follows:

An action was brought by the defendant in this case to recover the possession of the premises in question against one Donnelly, who was in possession as tenant of one Cheney, who intervened and employed counsel to defend the action. Thereafter and pending the action Cheney sold and conveyed to the present plaintiffs, who thereupon became entitled, under the sixteenth section of the Practice Act, to continue the defense of the action in the name of Cheney or to cause themselves to be substituted in his place. At the time of their purchase, which was the 4th of December, 1863, the plaintiffs had full notice of the pendency of the action, but they took no steps in regard to its further defense, and there was no covenant on the part of Cheney to further defend the title. They neither retained the counsel who had appeared for Cheney nor did they inform the city attorney of the pendency of the action, nor did they employ other counsel. In short, they took no steps

whatever to defend the action, but rested entirely upon the supposition or belief, as they allege, that the attorneys who represented Cheney would continue, after the purchase, to represent them, notwithstanding, as they admit, no request to that effect was made by them and no fee paid or offered. Some seven months after the purchase, the same being regularly on the calendar, the action was brought to trial by the plaintiff (defendant in the present case), but no one appeared on the part of the defense and the trial was altogether ex parte and resulted in favor of the plaintiff. The present plaintiffs had no actual notice or knowledge of the trial before or at the time it took place. When they learned that a trial had been had, whether in time or too late to move for a new trial, does not appear, and no reason is given why a motion for a new trial was not made.

In view of the foregoing facts, in connection with an allegation to the effect that their title is good while that of the defendant's is worthless and pretended, the plaintiffs claim the interposition of a court of equity, and allege that they are entitled to the relief sought by them on the ground of surprise.

That the complaint contains no cause of action hardly admits of debate. That it does not is manifest from the single fact, independent of the matters set out, that the complaint assigns no reason why the plaintiffs did not avail themselves of the remedy afforded by a motion for a new trial. If they were informed of the trial and judgment in time to move for a new trial, that remedy would have been all-sufficient, and that they were not informed in time is not alleged. We are compelled, therefore, to assume that they did learn it in time. Such being the case, they were bound to exhaust their legal remedies by moving for a new trial in the court of law before coming to a court of equity to obtain it. By this action the plaintiffs can obtain no relief which they could not have obtained by a motion for a new trial in the original action, for if their neglect to defend that action admits of legal excuse, full relief was attainable in that action by motion and no resort to this action was necessary. For this reason alone they cannot be allowed to maintain this action without showing that they had no opportunity to make the motion

by reason of some mistake, accident or surprise unaccompanied by any fault or negligence on their part.

But independent of the foregoing consideration, the complaint is, in our judgment, entirely destitute of equity. Courts of equity will not interfere and set aside a verdict or judgment at law on the theory of this case, except where it has been obtained by fraud or through some accident or mistake without fault or laches on the part of the party complaining, and after all remedy at law has been lost: 2 Story's Equity Jurisprudence, sec. 887 et seq. But all these grounds of equity jurisdiction are wanting in the present case. It is not pretended that the judgment in question was obtained by fraud on the part of the defendant in this action or anyone else. That the plaintiffs in this action were not prevented from making their defense by inevitable accident or mistake or excusable neglect is obvious upon a mere recitation of the facts. That their failure to defend was the result of gross inattention and negligence on their part, and not of a mistake, inadvertence or surprise, or excusable neglect, against which a court of equity will grant relief, finds, we think, a conclusive demonstration in the dry statement of the facts, which we have already given, unaccompanied by argument The relief sought for is asked upon the sole ground that they supposed or believed, under the circumstances detailed, that the attorneys of Cheney would continue their charge and management of the case. If such was their belief, it was without any foundation in reason and opposed to every intrinsic probability. The attorneys of Cheney would have been obnoxious to the charge of impertinence had they continued in the case after their client had ceased to have any interest in the result and assumed, unretained and unasked, to manage the case for his grantees, who not only did not seek a continuance of their services, but ordinarily would not, in view of the fact that they were public functionaries and had counsel appointed by the law whose duty it was, upon their suggestion, to attend to the matter in question. With full and complete knowledge of all the facts and circumstances, the plaintiffs failed to make any provision for the defense of the estate which they acquired, and rested upon the vague notion that because the lawsuit, which they had purchased with their

eyes open, had been on the calendar of the court for a long time without a trial, it probably never would be tried, and upon the unfounded belief that if by chance the case should ever be brought to trial, their interests would be defended by counsel whom they had never retained and who, therefore, would have had no legal claim against them for compensation for their services. It is impossible to conceive of a case more barren of all claim to the interposition of a court of equity. The whole case made by the plaintiffs may be summed up in the forcible language of the counsel for appellant: "They purchased a lawsuit and neglected to defend it." Instead of showing that they have been the victims of some fraud, accident, mistake or surprise against which ordinary prudence could not have furnished a safeguard, they show a want of prudence and care which would be inexcusable in a business man of the most limited capacity. Instead of showing that they belong to that vigilant class to whose complaints a court of equity always lends a willing ear, they have shown that they belong to that idle class of whom a court of equity will take no care, because with ample opportunity and means they fail to take care of themselves. To the complaints of this latter class a court of equity will not listen: Board of Commissioners of the Funded Debt of the City of San Jose v. Younger [29 Cal. 172], October term, 1865.

The order refusing to dissolve the injunction is reversed and the cause is remanded, with instructions to the court below to dissolve the injunction.

We concur: Sawyer, J.; Rhodes, J.; Currey, C. J.; Shafter, J.

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GROW, Respondent, v. ROSBOROUGH, County Judge of Siskiyou County, Appellant.

No. 763; February 5, 1866.

**Insolvency—Jurisdiction of County Courts.—The Effect of the Constitutional amendments is that the jurisdiction of the county courts in insolvency proceedings—contrary to what it was prior to 1863—rests upon the same basis as the general jurisdiction of the district courts and of the supreme court, both appellate and original, such proceedings being no longer "special cases" as then known.**

**Insolvency—Proceedings not Summary.**—In insolvency the proceedings setting the jurisdiction of the county courts in motion are not intended to be summary or hurried, since the point of importance in these cases, not so much the avoidance of delay as the promotion of substantial justice.

**Appeal—Settlement of Case.**—The Power to Grant New Trials is conferred upon all the courts referred to in the Practice Act, and when an appeal lies to the supreme court from an order disposing of a motion for a new trial, it becomes the duty of the trial judge to settle a correct statement properly presented.

SHAFTER, J.—Petition for a mandamus to be directed to the defendant commanding him to settle a statement on motion for new trial in Grow v. His Creditors.

It appears that Wetzel, one of the creditors, filed his written opposition to the petitioner's discharge on the ground of fraud. The issue was tried by a jury, who found fraud as alleged. Grow moved for a new trial for errors of law and on the ground that the verdict was not justified by the evidence. The judge refused to settle a statement on new trial, duly filed and submitted.

Proceedings in insolvency are no longer to be regarded as "special cases" in the sense in which that phrase was applied to them prior to 1863, for by the amendments to the constitution the jurisdiction became organic. To that extent the jurisdiction of the county courts in insolvency rests upon the same foundation as the general jurisdiction of the district courts, and that of the supreme court, both original and appellate.

We held in Dorsey v. Barry, 24 Cal. 449, relied upon in argument, that the jurisdiction in contested election cases was special—a statute creation. That the proceedings were intended to be summary, and that the subject matter made it essential that they should be so, in order to make them of any avail, and that the special procedure was, withal, so complete in itself, that it was manifestly the intention of the legislature that the litigation should be kept to the method which the act prescribed, and end where it ended; and, therefore, that that class of cases was not within the scope of the one hundred and ninety-third section of the Practice Act relating to new trials. But this reasoning has no application to the proceedings in insolvency. The jurisdiction of the county courts in insolvency is now, as has been remarked already, of constitutional

significance. The proceedings under the statute setting the jurisdiction in motion are not intended to be summary or hurried, but are, at least so far as the trial of oppositions is concerned, to be conducted according to the course of the common law in the main. Instead of its being necessary in the nature of the contest that judgment should be reached within a given interval, it is obvious that there is nothing to distinguish the controversy from litigation concerning property, or other personal interests, at large.

Further, if county courts cannot grant new trials in insolvency, it follows that they cannot do so in actions of forcible entry and detainer. The jurisdiction in both cases rests upon the same basis, and legislation in aid of the jurisdiction is, in both, equally complete and exhaustive. But that a new trial may be granted by a county court in a forcible entry case is not open to controversy.

Power to grant new trials is conferred upon all the courts referred to in the Practice Act; and wherever an appeal lies to this court from an order granting or refusing to grant a new trial, it becomes the duty of the judge to settle a correct statement properly presented. Under the Judiciary Act of 1863, we are authorized to review such orders when made in cases within the limits of our jurisdiction in error. It is true as the respondent claims, that cases in insolvency are not "cases in equity" (Cohen v. Barrett, 5 Cal. 195), nor do we consider that the jurisdiction in error can be supported as upon the "amount of the demand" nor as upon the "value of property in controversy." A petition in insolvency looks to a discharge as the principal purpose, and "oppositions" are interposed solely with a view to defeat it.

Were the question a new one we might doubt our jurisdiction, but it has been settled by long and unbroken usage, the question is broadly within the reasoning in Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717, and, furthermore, it was directly decided in Fisk v. Creditors, 12 Cal. 281. The argument in that case has been strengthened rather than weakened by the constitutional amendments.

The order is made absolute.

We concur: Sanderson, J.; Currey, C. J.; Rhodes, J.; Sawyer, J.

HANSON, Respondent, v. SMITH et al., Appellants.

No. 781; February 5, 1866.

**Judgment by Default in Excess of Relief Prayed.**—A judgment given the plaintiff must not be for anything more than what the complaint and summons inform the defendant will be asked of the court.

APPEAL from Twelfth Judicial District, San Mateo County.

The suit was for the foreclosure of a mortgage given to secure the payment of a note expressed as follows:

"Redwood City, Nov. 15, 1863.

"Twelve months after date, without grace, I promise to pay to Charles Hanson or order the sum of eighteen hundred dollars, payable in United States gold coin, or its equivalent in United States currency, for value received, with interest thereon at the rate of two per cent per month from date until paid. Interest payable monthly; and if not so paid to be added to the principal and bear interest in like manner.

(Signed) "W. C. R. SMITH."

In the complaint the only relief demanded was judgment against the defendant "for the sum of eighteen hundred dollars, with interest at the rate of two per cent a month compounded from the 16th of November, 1863, and that a decree in due form may be made for the sale of said premises in said mortgage mentioned." The summons required the defendant "to appear and answer the complaint filed; if the defendant fails to appear and answer the said complaint as above required the plaintiff will take default and apply to the court for the relief demanded in the complaint."

H. A. Schofield for respondent; J. D. Creigh for appellants.

SHAFTER, J.—The plaintiff was not entitled to a judgment payable in gold coin. The contract was in every material particular like that sought to be enforced in Reese v. Stearnes, 29 Cal. 273, decided at the October term, 1865.

Judgment was taken against the defendants by default, entered by the direction of the plaintiff's attorney. The

counsel fees, the amount paid for taxes, together with the interest thereon, were improperly included in the judgment as being in excess of the relief prayed for in the complaint: Lattimer v. Ryan, 20 Cal. 628; Gautier v. English, Oct. Term, 1865.

The court below is directed to modify the judgment so as to conform it to the views expressed in this opinion. Further ordered that appellant recover his costs of appeal.

We concur: Sawyer, J.; Sanderson, J.; Rhodes, J.; Currey, C. J.

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PEOPLE, Respondent, v. W. E. DENNIS et al., Appellants.

No. 605; February 19, 1866.

**Equity—Jurisdiction of District Courts.**—The equity jurisdiction with which our district courts are invested under the constitution is that administered in the high court of chancery in England. They are not, like the English exchequer, charged with the collection of debts due the state, nor with the collection of the public revenues; nor are they organized with any especial reference to the recovery or protection of state lands, whether above or below the level of tide water.

**Wharves—Power of Courts to Prevent Construction.**—The district courts have no power to decree the destruction or to enjoin the erection of a wharf, unless it is or will be a nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be an appreciable hindrance to the execution of some legislative act relating to fishery or to commerce or navigation.

APPEAL from Fourth Judicial District, San Francisco County.

Wm. Hall for respondent; H. and C. McAllister for appellants.

SHAFTER, J.—This is a bill to restrain the defendants from erecting a wharf from the north line of Chestnut street in the city of San Francisco toward and into the deep waters of the bay. It is alleged that the wharf, should it be erected,

will greatly interfere with and hinder the trade and commerce of the state at the harbor of said city, and greatly diminish its value, wherefore the plaintiffs pray that the erection of the wharf may be enjoined.

The court has found among other things that the defendants were engaged at the commencement of the action in constructing a wharf at the point mentioned, but has also found "that said wharf, so being built and proposed to be built by defendants, was not and would not be a nuisance, and was not injuring and would not injure the harbor of San Francisco, or the shipping or commercial interests thereof, or the people of the state of California." On the findings the court below dismissed the action.

First. We cannot go behind the findings, for the testimony is not before us; and the only question for us to consider is, whether, assuming the findings, the judgment is to be regarded as erroneous.

The gist of the action in one aspect of the case is a threatened injury to commerce and navigation resulting or to result from the erection of a wharf in a public harbor. The wharf may be an intrusion or encroachment upon tide waters and the soil thereunder belonging to the state, but the encroachment would not therefore be a public nuisance nor an injury to the harbor by legal conclusion. Lord Hale says (De Jure Marvis, 11): "It is not every building below the high-water mark that is, ipso facto, in law, a nuisance. For that would destroy all the keys that are in all the ports of England, for they are all built below the high-water mark." All the authorities concur in holding that whether any given encroachment upon a public or private right is a nuisance or not is a question of fact, and there have been at least two decisions to that effect in this state: Gunter v. Geary, 1 Cal. 466, Middleton v. Franklin, 3 Cal. 241. Where the court is satisfied that the encroachment or other matter complained of is not a nuisance, an injunction is necessarily refused, or dissolved if one has temporarily been granted: 2 Eden on Injunctions, 272.

Second. The complaint, in addition to the aspect under which we have thus far considered it, was doubtless intended also as a bill to enjoin or abate a purpresture—that is, an intrusion or encroachment upon tide waters and the soil

thereunder—without any reference to the effect of the encroachment upon public interests, whether to injure or to promote them.

Assuming the complaint to bear the double aspect of a bill to abate a nuisance and, as distinct therefrom, to enjoin or abate a mere purpresture, two questions are presented for consideration: First, Does the block in question belong to the appellants? and Second, If it belongs to the state as alleged in the complaint, can the further erection of the wharf be enjoined, and can it be abated in equity in so far as it has been proceeded with?

It is not only admitted but claimed by the appellants that the land belonged originally to the state, and that the title passed to those under whom the appellants claim, by legislative grant made on the 14th of May, 1861: Acts 1861, p. 363. The act is entitled "An act to provide for the sale of marsh and tide lands of this state." The first section confirms all sales of such lands previously made, and provides for future purchases outside of certain localities mentioned, and then proceeds as follows: "Provided, further, that no sales of lands, either tide or marsh, excepting alcalde grants, which are hereby ratified and confirmed, within five miles of said cities (San Francisco and Oakland) or within one mile and one-half of the state prison grounds aforesaid, shall be confirmed by this act."

It is admitted that the block described in the complaint was covered by alcalde grants made in the year 1848, and that those grants conveyed no title to the grantees.

The subject matter of the act is "marsh and tide lands." The sales which the act confirms, and the sales which it authorizes thereafter, as well as the sales which it inhibits, are of lands falling within this general description; and as we know of no principle upon which we can extend the subject matter beyond the limits expressly put upon it both by the title and the provisions of the act, we consider that the grants intended to be confirmed were alcalde grants of marsh and tide lands, to the exclusion of all others.

That portion of the block upon which the defendants were engaged in driving piles at the commencement of the action was below the line of low water, but as to whether the balance of the lot was permanently submerged at the date of the

act the findings are so far in conflict with each other that we are unable to determine. However the fact may be, it is admitted that the lands lying below the line of low water cannot be regarded as "marsh," nor do we consider that they can be regarded as "tide lands" in the sense in which those words are used in the act of 1861.

The phrase "tide lands," considered as a term of description, is unknown, so far as we are advised, in the law of tide waters; and it is certain that they were put to use for the first time in the legislation of this state in the act of May 13, 1861. Prior to that time the lands offered for sale by the state, having any connection with the present question, were described as "swamp and overflowed." In the act of the 13th of May, 1861, the lands to which it relates are described as "swamp and overflowed, and salt marsh and tide lands, donated to the state by act of Congress." There is not only no definition given of the new terms introduced, but the question of their meaning is still further embarrassed by the circumstance that no lands had then been donated to this state by Congress which can be considered as tide lands in any sense; nor has any such donation been made since. In the act of the 14th of May, 1861, passed the day after the act last mentioned, the word "marsh" is not qualified by the word "salt," and in various acts that had been passed since that date, the general subject has been still further embarrassed by invention. We have now to deal not only with "swamp and overflowed," "tide lands," "marsh lands" and "salt marsh," but with lands that are simply "overflowed," "tidal lands," "submerged lands," "overflowed and submerged" and "mud flats."

We find nothing in the act of May 14, 1861, affording the slightest clue to the sense in which the legislature used the words "tide lands" therein, and the act of the day previous, in which the phrase was introduced for the first time, is equally barren of suggestion. Under such circumstances that definition must be adopted which on the whole is most reasonable, and that is supplied in our judgment by the word "strand," "beach" or "shore" in the common-law sense of the terms.

Lands below the line of low water are usually spoken of as such, or as the bottom of the sea, or gulf, or bay, or as lands

lying in deep water. Further, "tide" is obviously used in the act as a term of distinction; but lands permanently submerged are distinguished for no purpose either useful or real by calling them tide lands. While it is claimed that the words are applicable to lands below the line of low water, it is admitted by counsel that they include also lands lying above it; the words, therefore, as thus defined, do not present or go upon the real distinction between the two classes of lands, and they are therefore valueless for the purpose of legal or scientific classification or arrangement. Further, if the words are applied to lands below the low-water line, then they would not stop at the channel but would reach to the opposite shore.

As opposed to all this, if the phrase is applied to the "shore" only, the word "tide" notes an important physical change to which the "lands" with which it is coupled are periodically subjected. As thus interpreted the periphrase would be "lands which are covered and uncovered by the tide."

On the ground, then, that the larger meaning ascribed to the words overlooks a real and governing difference, and, generally, on the ground that the definition would be entirely valueless for the purposes of arrangement, while the more restricted definition presents the difference named and therein subserves the very purpose to which all definition is appointed, we consider it more reasonable to hold that the legislature used the words in question as applicable to lands lying upon or constituting the "shore" rather than as including them, together with other lands differing specifically from them, and extending indefinitely beyond them into deep water. The result is that the block, in so far as it lies below the line of low water, belongs to the state, and the wharf, in so far as it has been built, is a purpresture. We shall now proceed to the second branch of the inquiry.

The district courts have no power, as courts of equity, to decree the destruction of a naked purpresture nor to restrain one if threatened. The intrusion, whether perfected or threatened, is not distinguishable, so far as the question of equitable cognizance is concerned, from intrusions upon uplands belonging to the public or to individuals. In all such cases parties are left to their strictly legal remedies unless they can make out a case of damage irreparable at law.

Though it is now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the attorney general, the jurisdiction seems to have been acted on with great hesitancy and caution. Thus it is said by Lord Eldon, "that instances of the interposition of a court of equity in England in such cases are confined and rare; and more information on the subject is to be collected from what has been done in the court of exchequer upon discussion of the right of the attorney general, by some species of information, to seek on the equitable side of that court relief as to nuisance, than from any other quarter": Attorney General v. Cleaver, 18 Ves. 211. Chancellor Kent, in Attorney General v. Utica Insurance Co., 2 Johns. Ch. (N. Y.) 382, remarks "that the equity jurisdiction in cases of public nuisance in the only cases in which it had been exercised, that is, in cases of encroachment on the king's soil, had lain dormant for a century and a half—that is from Charles I down to 1795. But the jurisdiction has been sustained upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all that it is one of delicacy, and accordingly the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardiness of the law could reach it."

It was held in Rowe v. Granite Bridge Company, 21 Pick. (Mass.) 344, "that where it is obviously necessary that a nuisance should be immediately suppressed, as in case of a powder-house, or a slaughter-house, or a chemical laboratory, equity will interfere until the slower process by indictment could be put in motion."

A bill or information was filed in the court of chancery in New Jersey by the attorney general in the name of the state, charging the defendants with being in the act of erecting a bridge over the Passaic river, which is a navigable stream, in such a way as to interfere materially with the navigation; and it called upon the court, on the ground that the bridge would be a serious detriment to the community and a public nuisance, to interfere and prevent the further erection of the same, and also to order the same to be abated. The information charged that great mischief and irreparable injury would ensue to the public by the erection of the bridge.

But the application for an injunction was denied, on the ground that a court of equity ought not to interfere in a case of misdemeanor when the object sought can be as well attained in the ordinary tribunals; and under the facts as made out, the court considered that the proper course was by indictment at common law: Attorney General v. N. J. R. & Trans. Co., 3 N. J. Eq. (2 Green Ch.) 136.

Courts of equity have no criminal jurisdiction, and public nuisances are misdemeanors. This accounts for the peculiar disinclination to which the foregoing authorities refer, while the cases, in their turn, fix the instances in which the disinclination has been resisted and overcome.

The clear result is, that if a wharf built or threatened to be built upon tide lands, or below the line of low water, without public authority, is or would be injurious to commerce and navigation, and proceedings at law would not be adequate to the emergency, the erection may be abated or enjoined in equity; but where the wharf is not or would not be attended with any such result, the equitable jurisdiction fails and the people are left to their legal remedies. If the soil in this case belongs to the state—and such is the theory of the bill—then the wharf if erected will belong to it also. The defendants will be unable to collect wharfage, and will have no rights except those belonging to the public at large. Possession of the land and wharf, should it be withheld, can be recovered in ejectment, and thereafter the wharf can be managed by the state according to its own views of public good: Angell on Tide Waters, 218.

It is thought that there is no case in the books in which a court of equity, as such, has ever abated or enjoined a purpresture simply on the ground that it was one. The judicial department of the English court of exchequer is divided into one of equity and one of law; and the primary business of the former is to recover lands belonging to the crown: so that purprestures upon arms and creeks of the sea are the proper subjects of information in that court: Attorney General v. Richards, 2 Anst. 603; Attorney General v. Johnston, 2 Wils. Ch. 87. The title to the soil is in the state by private right (jus privatum), subject, however, to the public right (jus publicum) of fishery and navigation; and the attorney general may proceed for the purpose of protecting the private

right from the purpresture or the public right from nuisance, by information on the king's remembrancer's side of the exchequer, by English bill, praying a personal decree against the defendant in the suit. The question of nuisance, as being a matter of fact, the court may determine on evidence, or it may direct an issue: Attorney General v. Parmenter, 10 Price, 378; Attorney General v. Barridge, 10 Price, 350. If the erection complained of appears to be a purpresture without being at the same time a nuisance, the court may direct an inquiry to be made whether it would be more beneficial to the crown to abate the purpresture or to suffer the erection to remain and be arrented; but if the purpresture were also an injury to the public right of fishery and navigation, with which the crown has nothing to do except to conserve them, no such inquiry will be had, and the nuisance will be decreed to be abated: 2 Story's Equity Jurisprudence, 233, 922; Angell on Tide Waters, 201; 2 Anst. 606.

From this it would seem that in the exchequer, when it appears that the purpresture is a nuisance, that is, an injury to the jus publicum, a decree to abate follows as a matter of course; but if it is found, as in the case at bar, that the purpresture is not a nuisance, then so far as the public stands related to the proceedings, the suit is at an end, but the information is retained for the purpose of ascertaining the effect of the purpresture on the private right of the king; and the decree, allowing the purpresture to stand or adjudging its destruction or removal, depends upon the result of the inquiry. This procedure is clearly referable to the peculiar relation existing between the exchequer and the crown, and it was so considered by Chancellor Kent in Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 381.

When the district court found that the wharf in question would work no detriment to the public rights of which the state is but the conservator, it could not do otherwise than deny the injunction and dismiss the bill, unless it can be made out that the district courts in this state bear the same relation to the state as the property owner, and to the state revenues, as that borne by the English exchequer to the crown and its revenues; and we conceive that those courts stand in no such relation.

The equity jurisdiction with which our district courts are invested under the constitution is that administered in the high court of chancery in England. They are not, like the English exchequer, specially charged with the collection of debts due to the state, nor with the collection of the public revenues; nor are they organized with any especial reference to the recovery or protection of state lands, whether above or below the level of tide water. They will protect such lands by injunction, but it is only in cases where like protection would be given to the lands of individuals—that is, in cases of threatened injuries which, if committed, would be irreparable at law. To that extent the justice administered is preventive and not remedial. But we are at loss to conceive upon what ground it can be claimed that the district courts, in the exercise of remedial justice, can, with a jury or without it, decree the demolition of any erection upon the public domain for the reason simply that it was put there without leave. In a case reduced to that degree of meagerness, not only is the nuisance feature wanting, and the irreparable damage feature also, but the case has no damage in it; and furthermore it might appear, as a fact in the case, that the purpresture was positively and largely beneficial. If a district court can, in the exercise of its equitable powers, decree the destruction of purprestures as such, then it can do in equity what cannot be done in this country on indictment (Angell on Tide Waters, 209), and the power furthermore must proceed from a source entirely foreign to the principles upon which the equity jurisdiction is admitted, on all hands, to be founded.

Again: Wharves in themselves considered are not of evil consequence, but the reverse, and we consider that neither the district courts nor any other court can prevent their erection or decree their destruction simply upon the ground that they are erections upon public lands, placed or to be placed there without license. It is enough that parties volunteering in the business can acquire no rights as against the state; that the state may, through the proper executive agencies, at any time take possession of its own or recover possession thereof by judicial proceedings, and being in possession, that the executive department through the officers to whose discretion the economical question may have been intrusted, can preserve them if useful or abate them if they cannot be made to con-

tribute to the public good. The courts can order them to be abated only when they are found to be pernicious.

The English exchequer even, specially charged as it is with the collection of the king's debts and duties, and with the ordering of his revenues and the protection of his property, is not in the habit of decreeing the abatement of wharves, or moles, or embankments on the line of navigable waters, upon the ground of purpresture merely, but considerately stays its hand until it has determined whether the marine revenues of the crown will be helped or damaged by demolition. In this state the district courts, as already stated, cannot halt in the exercise of their judicial powers upon any such question; but it does not therefore follow that they should, or can, blindly decree the destruction of every unlicensed pier and bulkhead in the state for no better reason than it is unlicensed; but on the contrary it would seem if they cannot, like the English exchequer, abate intelligently in cases of pure purpresture, that they ought not in such cases to abate at all. Lord Holt says: "Where the soil is the king's the building below the high-water mark is purpresture, an encroachment or intrusion upon the king's soil which he may either demolish, or seize or arrent, at his pleasure." The state, in cases of mere purpresture, has the same powers in respect to its tide-water lands, but the courts can neither determine nor know its "pleasure" concerning the alternatives mentioned. They are incompetent to decree that a naked purpresture should be "seized" or "demolished"; for the same reason they cannot decree that it shall be "arrented." The course to be pursued in such cases depends upon sovereign "pleasure," and therefore it cannot be turned into a question of public justice.

So far as we are advised there is no American case, at least, in which the power here claimed for the district courts to abate mere purprestures upon tide lands has ever been exercised. On the contrary, the courts have uniformly refused to interfere in such cases, unless the erection complained of was a nuisance or threatened irreparable damage. Of these cases the one cited from 2 Green is a sample.

By the civil law to repair and strengthen the banks of public rivers is permitted as being most useful, provided navigation be not impeded; and one who built a mole into the sea was protected if no one was injured thereby. The judicial

decisions in the maritime states of the Union, recognizing the usages of the people as molded by the necessities of a new country, have been conceived to some extent in the same spirit. Should we hold that wharves and other like improvements upon all the navigable waters in this state may be abated in equity for no better reason than that the state did not formally license their erection, we should go further than any American court has ever gone, and if the innovation were not followed by results greatly prejudicial to fishery and navigation, the credit of the escape would not belong to the doctrine.

We do not intend in this opinion to deny the power of the state to deal with its tide-water lands through the legislative and executive departments of the government, in such manner as shall be thought most conducive to the public good. All that we intend to decide is, that the district courts have no power to decree the destruction or to enjoin the erection of a wharf, unless it is or will be a nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be an appreciable hindrance to the execution of some legislative act relating to fishery or to commerce or navigation.

The order appealed from is reversed and the judgment is affirmed.

We concur: Currey, C. J.; Rhodes, J.; Sawyer, J.; Sanderson, J.

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PEOPLE, Respondent, v. CHANG WANG, Appellant.

March 14, 1866.

**Grand Juror—Residence.—Where, on a Showing That a Grand Juror had a Dwelling** in San Francisco and lived in it during the winter, also a country seat in an outside county, where he lived during the summer and where he voted, the trial court's ruling that he was competent to be a grand juror in San Francisco will not be disturbed.

APPEAL from Fifteenth Judicial District, San Francisco County.

Attorney General for respondent; C. N. Fox for appellant.

SAWYER, J.—The principal error relied on is the refusal of the court to set aside the indictment on the ground that T. O. Selby, the foreman of the grand jury which found the bill, was not, at the time of finding the indictment, a resident of the city and county of San Francisco, but was a resident of the county of San Mateo. The testimony of Mr. Selby is to the effect that he has a winter residence in San Francisco, and a summer residence in the country in the county of San Mateo; that he intended to occupy his residence in San Francisco in the winter season and his residence in San Mateo in the summer; that he first moved to his summer residence in San Mateo county in the summer of 1863; that while there he voted in San Mateo county; that he moved back to his winter residence in San Francisco last September; that on the 20th of April last, five days before the finding of the indictment, he returned to his summer residence in San Mateo county; that his business is in the city of San Francisco, and, that since his return to the city last fall with his family he had considered the city his residence, and had voted there. The court found him to be a resident of San Francisco, and a competent grand juror. Upon the evidence we do not think we should be justified in setting aside the finding of the district court on this point. The testimony does not satisfactorily show Mr. Selby to have been a nonresident, and in such cases the ruling of the district court will not be disturbed: People v. Stonecifer, 6 Cal. 411; People v. Henderson [28 Cal. 465], July term, 1865.

We cannot say that the court did not soundly exercise its discretion in denying a new trial on the ground of newly discovered evidence.

The judgment is affirmed and the district court directed to appoint a day for carrying the judgment into execution.

We concur: Sanderson, J.; Currey, C. J.

We dissent: Rhodes, J.; Shafter, J.

WHIPPLE, on Habeas Corpus, Petitioner.

No. 853; March 14, 1866.

**Payment—Legal Tender Act.—A fine is not a "debt" under the act of Congress making treasury notes a legal tender in payment of debts.**

G. F. Sharp for petitioner.

SAWYER, J.—The petitioner, who is in custody under an order directing him to be imprisoned until payment of a fine imposed as a punishment on a conviction under the act to prohibit gaming, seeks to be discharged on habeas corpus. The amount of the fine was tendered in United States treasury notes, and the tender refused on the ground that said notes are not receivable in satisfaction of the fine.

The principle upon which the decision must depend was determined in Perry v. Washburn, 20 Cal. 350. The opinion in that case was written by Chief Justice Field—now a justice of that court with which the jurisdiction to give the act of Congress in question an authoritative construction rests—and was concurred in by all the justices. The court held that taxes are not debts within the meaning of the provisions of the act of Congress making treasury notes a legal tender in payment of "all debts public and private," and say: "A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the taxpayer and state; it does not draw interest; it is not the subject of attachment; and it is not liable to setoff. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer. It operates in invitum. If authority for the distinction is required, it will be found in the cases of City of Camden v. Allen, 2 Dutch. (26 N. J. L.) 398, Peirce v. City of Boston, 3 Met. (Mass.) 520, and Shaw v. Peckett, 26 Vt. 482."

A fine imposed in invitum as a punishment for an offense in pursuance of statutory provisions answers all these condi-

tions, and appears to us to be as free from any element of a debt in the sense in which that term is used in the act of Congress, and as clearly without the provisions of the act, as a tax: See, also, Dixon v. State of Texas, 2 Tex. 482; McCool v. State, 23 Ind. 130, 131. We also think the fine in question in this case was required by the act of April 4, 1864, "to be paid exclusively in the gold and silver coin of the United States."

The writ must, therefore, be discharged and the prisoner remanded, and it is so ordered.

We concur: Sanderson, J.; Currey, C. J.; Rhodes, J.; Shafter, J.

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DENNIS, Appellant, v. BELT, Respondent.

No. 785; April 2, 1866.

**Pleading—Variance.—Calling Sums of Money "Money Advanced and expended," etc., in a counterclaim and calling them a "book account" in the answer, does not render the latter ambiguous, and evidence of a "book account" produced at the trial in proof is no variance.**

APPEAL from Thirteenth Judicial District, Merced County.

Samuel A. Baker for appellant; C. Dorsey and P. D. Wigginton for respondent.

SANDERSON, J.—There was no fatal variance between the defendant's counterclaim as alleged in his answer and the testimony offered by him in its support. The counterclaim was for "money advanced and expended for plaintiff at his special instance and request." The fact that defendant in his answer calls the various sums so advanced a "book account" is of no consequence. It does not even have the effect to render the answer ambiguous and uncertain. The court below seems to have considered the answer as setting up a counterclaim resting in matter of book account strictly. If so the court mistook the nature of the defense. The mode

in which the defendant proposed to prove his case was proper. The defendant's books were not evidence. They could have been used by his witnesses as memoranda by which to refresh their memory but for no other purpose.

Judgment reversed and new trial ordered.

We concur: Sawyer, J.; Shafter, J.; Rhodes, J.; Currey, C. J.

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## PIERSON, Appellant, v. McCAHILL, Respondent.

No. 786; April 5, 1866.

**Evidence—Parol to Explain Written Contract.**—The defendant may not introduce at the trial oral testimony to vary or contradict the terms of a written contract sued upon, when his answer contains no averment of mistake, etc., in that connection; but if, by leave of the court, he so amends the answer as to make it show the contract as he claims its terms really were, alleging that a material term had been omitted in the writing, and also to make it ask for a reformation in that respect and that the contract as reformed as asked be enforced in his favor, then such testimony is admissible.

**Compromise of Debt.—A Contract Whereby a Single Creditor Agrees** with his debtor to compromise the debt cannot be enforced, but where various creditors have so contracted with a common debtor the case is different.

**Judgment—Naming a Sum.—A Sum is not the Less Included** in a judgment if, instead of being named there in figures, it is referred to in apt words to indicate money then on deposit in court.

G. W. Tyler for appellant; J. B. Hall for respondent.

SAWYER, J.—This is the fourth appeal in the case: See 21 Cal. 122; 22 Cal. 128; 23 Cal. 249. The questions raised and discussed in the briefs all arise on the judgment-roll. On the first trial the defendant introduced under objection parol evidence to show that a written contract between the parties, before put in evidence, did not contain the entire contract—that a material term of the contract in favor of the defendant had been omitted by mistake of the scrivener in drafting the instrument. But the mistake was not set up in the answer.

The judgment in favor of the defendant was reversed principally on this ground. The court say: "It is well settled that verbal evidence is inadmissible to contradict or vary a written contract, but this rule is inapplicable where a mistake has been made, and the object is to correct it. In this case, however, the mistake is not averred in the answer, and the agreement having been given in evidence without regard to the mistake, oral testimony was not admissible to vary it by the incorporation of a new term. There is no doubt of the power of the court to reform the instrument, but this could only be done upon a direct application, and the matter should have been stated in the answer as a distinct ground of relief. Until reformed, the instrument must stand as the contract of the parties, and it was error to allow the defendant to prove a different contract, or to give evidence of an intention different from that actually expressed. The rule upon the subject is universal and inflexible, and until the contract has been reformed so as to express the intention of the parties, the defendant cannot claim the benefit of that intention. . . . . As it will be necessary to amend the answer before the case is retried, the foundation for the objection made, even if it were tenable, will be removed."

When the case went back for new trial, the defendant, in pursuance of the suggestion in the opinion, by leave of the district court, filed an amended answer, in which they set up the contract as it was claimed to have been made, and alleged that a material term of the contract had been omitted by a mistake, and asked that it be reformed by the court and then enforced in his favor as corrected. On the second appeal it was held that the amended answer was properly filed: 22 Cal. 130. The defendant having succeeded on a trial upon the merits, a third appeal was taken by the plaintiff. The principal question now made was then presented and decided against the plaintiff, but the judgment was reversed because the court below refused to continue the cause pending an appeal from an order refusing to change the place of trial: 23 Cal. 254. That the answer discloses a case which justifies a reformation of the agreement, and that parol evidence is admissible to show the mistake under the present answer was, we think, substantially decided on the previous appeals: 21 Cal. 122, and 22 Cal. 127, and 23 Cal. 250. At all events, we think

the answer sufficient, and that it presents an equitable defense. No question as to the admissibility of parol testimony is presented by the record. There is nothing in it to show that parol evidence was introduced. But there can be no doubt that, under the answer as it now stands, parol evidence was admissible to show the alleged clerical mistake in omitting one of the terms of the contract: 1 Story's Equity Jurisprudence, sec. 152 et seq.

The validity of the compromise by which the various creditors agreed to accept a part in satisfaction of the whole debt is also sustained in the decision on the first appeal: 21 Cal. 129. Such compromises stand upon a different footing from those agreements in which a single creditor, without reference to any other, agrees with his debtor without consideration to receive a part in satisfaction of the whole debt.

There is no foundation in the record for the last point made by appellant that the court erred in not giving judgment for the one hundred and twenty-four dollars and forty-three cents. The findings are in accordance with the answer, and they and the judgment show that this sum was on deposit in court, and the judgment directs it to be paid over to the appellant—the plaintiff in this suit.

We find no error in the record. Judgment affirmed.

We concur: Rhodes, J.; Sanderson, J.

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ANGUS McKAY, Appellant, v. PETALUMA LODGE NO. 77, F. A. M., et al., Respondents.

No. 817; May 31, 1866.

**Ejectment.—In Ejectment It is not a Good Plea "that the title of said plaintiff, if any he has, to said premises did not accrue within five years prior to the commencement of this suit, and that he has not been in possession thereof within five years prior to this suit."**

APPEAL from Seventh Judicial District, Sonoma County.

E. A. Lawrence for appellant; Geo. Pearce for respondents.

CURREY, C. J.—Ejectment for a parcel of land in the town of Petaluma in Sonoma county. The plaintiff had judgment. The defendants moved for a new trial which was denied, and then appealed to this court.

The evidence before the court shows that in 1855 one Stephen C. Haydon had the land in question in his actual possession, and that in April of that year he conveyed by deed, all his right, title, interest, estate, claim and demand therein to one Alexander McKay who thereupon entered into the same. In August, 1856, Alexander McKay and one William R. Wells executed a deed conveying all their right, title and interest in the premises to the plaintiff, and thereafter the plaintiff used the property in connection with one Heber Gowen, who owned or was in possession of the adjoining lot of ground. The defendants allege in their several answers that the premises in dispute belonged to Gowen, under whom they claim to have acquired the right to the possession and use of the same. They also plead as a defense in bar "that the title of said plaintiff, if any he has to said premises, did not accrue within five years prior to the commencement of this suit, and that he has not been in possession thereof within five years prior to this suit." If this was intended as a plea of the statute of limitations, then it is only necessary to say that it does not tender such an issue, as a reference to the statute will render apparent. We have examined the entire evidence, both documentary and parol, and find Haydon in the prior actual possession of the property recovered in this action, and that such property came by deeds of transfer to the plaintiff. It does not appear that he ever parted with his title to it. Nor does it appear that Gowen or the defendants ever acquired the right to its possession adversely to the plaintiff. We think the judgment right, and that it should be allowed to stand.

Judgment affirmed.

We concur: Sanderson, J.; Sawyer, J.; Shafter, J.; Rhodes, J.

CITY AND COUNTY OF SACRAMENTO, Respondent, v. S. W. BURKE et al., Appellants.

No. 3898; May 31, 1866.

**Injunction—Filing After Act Done.**—An injunction filed after the actual doing of the act enjoined fails for want of subject matter.

**Contempt—Disobeying Injunction.—A Tax Collector** enjoined against making a tax sale cannot be in contempt for disobeying the injunction when the sale was made before its issue.

APPEAL from Sixth Judicial District, Sacramento County.

G. R. Moore for respondent; Winans & Hyer for appellants.

SHAFTER, J.—There are nine general objections taken to the judgment in argument, and they are resolved by counsel into thirty-one distinct points. The case was not heard at the bar and no brief has been filed by the respondents.

The action is upon a bond given in aid of an application for an injunction restraining a tax sale. But the injunction was an anachronism and so was the bond. The sale intended to be forbidden took place before the injunction was served on the tax collector (Elliott v. Osborne, 1 Cal. 396) and before it was granted also. The sale was on the 15th of February, 1858. The injunction is not dated, but was filed on the 16th, and the parol proof shows that it was served on that day. So far as the sale is concerned, the injunction failed for want of subject matter. To that extent contempt was impossible. The "certificate of sale" which the tax collector is forbidden by the injunction to issue had reference to a certificate based on the prospective sale which it was the purpose of the bill to enjoin.

There are other grounds of objection which we consider to be well taken, but we do not, under the circumstances, feel called on to discuss them.

Judgment reversed and new trial ordered.

We concur: Sanderson, J.; Sawyer, J.; Currey, C. J.; Rhodes, J.

BULL, Respondent, v. EBY et al., Appellants.

No. 920; May 31, 1866.

**Accord and Satisfaction.—Payment of a Part of a Sum** due is not satisfaction of the whole, even though the payment is made and received in pursuance of an agreement that it should be so regarded, since such an agreement would be without consideration.

**Contract—Validity of Agreement to Take Part Payment.**—An agreement by a creditor with a debtor to accept payment of part of a debt in satisfaction of the whole is not the less invalid, as being without consideration, if the part, instead of being named in terms of money, is named as "property worth" that much money.

APPEAL from Second Judicial District, Tehama County.

Myrick & Earll for respondent; McCullough & Nagle for appellants.

SAWYER, J.—Action upon a promissory note and to foreclose a mortgage given to secure it. Upon trial of the issues relating to payment, and satisfaction, the defendant requested the court to give to the jury the following instruction, viz.:

"That if they believe from the evidence that Williams was acting as agent for Bull and as such agreed to take two thousand five hundred dollars for the indebtedness secured by the Bull note and mortgage, and the offer was accepted by Eby, and that thereupon Eby paid the sum of two thousand five hundred dollars in property, which was accepted by Williams in satisfaction or payment of the Bull note and mortgage, then you must find for the defendant."

The court refused and defendant excepted, and the refusal of this instruction is the only ruling complained of in appellant's brief. The amount due on the note was much larger than two thousand five hundred dollars. The solution of the legal problem presented depends upon the question as to whether the proposition presented by the instruction is, that the agreement to accept, and the acceptance of a less sum than the amount due, is a satisfaction of the larger sum; or that the agreement to accept certain specified amounts, notes of other parties and other property of a value less than the

amount due is a satisfaction. If the former is the legal proposition involved in the instruction, the court was right in refusing it; for it is well settled that a payment of a part of a sum due is not a satisfaction of the whole, notwithstanding the payment is made and received in pursuance of an agreement that it shall be in satisfaction of the entire demand. Such an agreement is without consideration and void: Deland v. Hiett, 27 Cal. 612, 87 Am. Dec. 102. But if the latter is the proposition, the instruction is correct and it should have been given; for an agreement to accept and the acceptance of property of any kind of less value than the amount due in satisfaction of the demand is a valid contract. The party agrees to do and does something that he was not bound to do before, and it is not for the court to take upon itself the duty of determining the advantages and disadvantages to the parties concerned of the new arrangement as compared with the old. There is a modification of the obligation of the parties, and this affords a good consideration, however small.

Now the proposition is, that Bull, through his agent, "agreed to take two thousand five hundred dollars for the indebtedness secured by the Bull note and mortgage, and the offer was accepted by Eby, and that thereupon Eby paid the sum of two thousand five hundred dollars in property," etc. This is an agreement to take so much money less than the amount due, and not specific property of less value, and a subsequent payment of that particular sum in property, and not the taking of specific property in satisfaction of the note itself. The payment of the sum of two thousand five hundred dollars in a particular way was the thing taken in satisfaction of the note and mortgage. Under the agreement hypothetically stated, the defendant might have paid the two thousand five hundred dollars in money, had he chosen so to do, and so Bull might have demanded the money. The defendant was not bound to pay in property, nor was Bull bound to receive it. The proposition involved, then, was not an accord and satisfaction, but an agreement to receive a less sum in money in satisfaction of a larger sum, and it makes no difference whether the smaller sum was paid in money or property. The amount to be paid is fixed.

The same defect exists in pleading the matter of defense. An accord and satisfaction by giving and receiving property

insatisfaction of the amount due is not properly set up in the answer. A payment rather is alleged. We think the instruction properly refused.

Judgment affirmed.

We concur: Sanderson, J.; Shafter, J.; Currey, J.; Rhodes, J.

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PEOPLE, Respondent, v. SILVA, Appellant.

No. 978; May 31, 1866.

**Criminal Law—Oral Instruction.—Without the Consent of the defendant, it is error for the court to give an oral instruction to the jury in a criminal case.**

SAWYER, J.—The defendant was indicted and tried for an assault with intent to commit murder. The jury having returned a verdict which the court regarded as ambiguous, in not designating with sufficient precision which of the offenses of different grades defined in the section of the statute under which the indictment was framed, gave further instructions and sent the jury out to rectify their verdict in this particular. After consulting for an hour or more without being able to determine the offense of which they found the defendant guilty, the jury were again brought before the court, and after some conversation between the court, counsel and jurors, the foreman remarked that "some of the jurors do not know for what crime the defendant is indicted." Thereupon the court read the section under which the indictment was framed, and, after some further conversation, gave them oral instructions as to what crime was charged in the indictment, to all of which defendant excepted. This oral instruction was erroneous under the provisions of section 362 of the Criminal Practice Act as heretofore construed by this court and by our predecessors: People v. Chares, 26 Cal. 78; People v. Woppner, 14 Cal. 437, and cases cited.

For this error the judgment and the order denying a new trial must be reversed, and a new trial granted, and it is so ordered.

We concur: Sanderson, J.; Shafter, J.; Currey, C. J.; Rhodes, J.

PEOPLE, Respondent, v. JUAN CASTRO, Appellant.

No. 929; May 31, 1866.

**Courts—Correction of Minutes in Criminal Case.**—In sustaining a motion made by a district attorney, on the day to which a case has been continued, for the correction of the court's minutes of the day from which the continuance was had—which minutes show erroneously the granting of a new trial to the defendant—the court only exercises the ordinary power of courts to amend their records while the proceedings are in fieri, so as to make them correspond with the real facts and give a true history.

APPEAL from Santa Clara County.

Attorney General for respondent; D. W. Herrington for appellant.

SAWYER, J.—The defendant was indicted for an assault with an intent to commit robbery and convicted. When the prisoner appeared for sentence he moved for an arrest of judgment on the ground of insufficiency of the indictment. The entry in the minutes of that day's proceedings was to the effect that defendant moved for an arrest of judgment and for a new trial, and that the motion was granted. There is nothing else in the bill of exceptions, or the record, to show that a motion for new trial was in fact made; and nothing appears in the record upon which to base such a motion. On a subsequent day of the same term—the day to which the cause had been continued—the district attorney moved the court to amend the minutes of the proceedings of the preceding day by striking out that portion of the minutes which showed a motion for new trial, and that a new trial was ordered, which motion was granted. The defendant was then called up for sentence, and a motion in arrest of judgment having been again made and denied, the judgment from which this appeal is taken was entered against him.

The only questions are, firstly, as to the sufficiency of the indictment; secondly, as to the regularity of the amendment of the minutes by striking out that portion showing an order granting a new trial, and then passing judgment upon the verdict before rendered without any further trial.

The indictment we think sufficient.

As to the other questions, it is manifest from the record that the court, in granting the motion of the district attorney, only exercised the ordinary power of courts to amend their records while the proceedings are in fieri so as to make them correspond with the real facts, and give a true history of their acts. There is nothing in the record to show that this amendment was improperly made, and the presumptions are all in favor of the correct action of the court.

Judgment affirmed.

We concur: Sanderson, J.; Shafter, J.; Currey, C. J.; Rhodes, J.

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## ROSS, Respondent, v. PARVIN, COHEN and HALL, Appellants.

No. 685; May 31, 1866.

**Public Lands—Title Under Certificate of Purchase—Collateral Inquiry.**—The holder of a certificate of purchase from the United States and in possession of the land for fourteen years under claim of right has a title that may not be inquired into in a suit in a state court for an injunction to stay waste.

**Injunction—Staying of Waste.—A Mortgagee Under a Mortgage** given by one of several land owners may have an injunction to stay waste as to only the land of the mortgagor.

**Injunction—Cutting Wood—Acts Already Committed.**—A bill filed to restrain the cutting of wood on mortgaged premises is to that extent without subject matter, if the wood has already been cut.

**Receiver—Insolvency.—A Prayer for a Receiver, as to Wood Cut on Mortgaged** premises, in a bill for an injunction to stay waste, is to be denied when it has not been shown that the defendants are insolvent.

APPEAL from Sixth Judicial District, Sacramento County.

Parvin, for value received, had, on the 11th of February, 1860, executed and delivered his note to Ross for two thousand five hundred dollars, and with it a mortgage as collateral security. This action was begun on the 28th of November, 1863, and at first was merely for a foreclosure of this mort-

gage, but the plaintiff filed a supplemental complaint, averring that Mitchell, McNally, Heath, Cohen and Hall were cutting wood on the mortgaged premises and carrying it away, with the connivance of Parvin, and praying for an injunction to restrain them. Mitchell, McNally and Heath, answering, admitted the cutting and carrying away, but alleged that Hall and Cohen had told them to do so, claiming to own the land the cutting was done on, and Hall and Cohen answered avowing this ownership. All the defendants, except Parvin, who defaulted, prayed that the temporary injunction be dissolved, but the court made a decree as prayed in the original and supplemental complaints, made the injunction permanent and appointed the sheriff receiver, "to take into his possession all wood now cut on said premises and dispose of the same at public auction or private sale . . . . and bring the proceeds into court to abide the further order of said court."

H. H. Hartley, for respondent; Coffroth & Spaulding for appellants.

SHAFTER, J.—The appellants, Cohen and Hall are strangers to the mortgage given by Parvin to the respondent. The lands claimed by them under certificates of purchase from the United States were not swamp and overflowed, but dry land fit for cultivation. On that point there was no conflict in the testimony. The certificates were produced and received in evidence, and the purchases were also proved, in effect, by Kerchival, the agent and witness of the plaintiff, and by the testimony of Cohen. From this it follows that the decree, in so far as it restrains the appellants from cutting wood and timber on their respective claims, is erroneous. Parvin had no title, so far as the record shows, that can be considered for a moment as paramount to theirs.

Further: the land covered by Cohen's certificate of purchase has been in his possession since 1852, under claim of right, and therefore his title can neither be determined nor investigated in this action: San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187.

As to the decree in its relations to the cord-wood, it appears from the testimony of Parvin and Arnold that about forty cords were cut upon Cohen's claim, and there is no testimony

in the record to the contrary. The rights of the plaintiff under his mortgage do not, therefore, extend to this portion of the seventy cords ordered for sale into the hands of the receiver.

But further: conceding that Cohen had no interest in the lands on which the forty cords were cut, and that the cutting was by collusion with Parvin, still as the cutting was done, as appears by the uncontradicted testimony of Parvin, before the restraining order was made, and particularly as it does not appear that either Cohen or Parvin is insolvent, the wood was not liable to sequestration: Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90.

The judgment, in so far as it acts upon the appellants Cohen and Hall, is reversed and a new trial ordered.

We concur: Sanderson, J.; Sawyer, J.; Currey, C. J.; Rhodes, J.

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POST et al., Respondents, v. EATON, Appellant.

No. 814; June 1, 1866.

**Suretyship—Accepting Cumulative Security.—A Surety is not Discharged** by the acceptance by the creditor of a security merely cumulative to that he had before, although the consent of the surety may not have been received beforehand.

APPEAL from Fifth Judicial District, San Joaquin County.

Tyler & Cobb for respondents; L. T. Carr for appellant.

SHAFTER, J.—This action is brought on the several liability of the defendant as one of the signers of a joint and several promissory note. The answer alleges that the defendant was but a surety in fact, and that the plaintiffs knew it, though the suretyship did not appear on the face of the note; and that the defendant was discharged by a subsequent contract for further time made between the plaintiffs and the principal against the defendant's protest. The answer also al-

leges as a second defense that the action was brought before the time, as enlarged, had fully run.

The answer was demurred to and the demurrer was sustained. The appeal is from the judgment.

The new contract by its terms was to become "null and void" in the event that the note in suit should be paid. To this extent the old and the new are brought into relation, but no further. The note was neither superseded, nor postponed, nor otherwise varied. The contract pleaded was merely a security cumulative to that which the plaintiffs had before. This view virtually disposes of both the questions presented.

Judgment affirmed.

We concur: Sawyer, J.; Sanderson, J.; Rhodes, J.

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KERR, Respondent, v. McCLOSKEY, Appellant.

No. 956; June 1, 1866.

**New Trial.—The Statement Accompanying a Motion for a new trial must specify the grounds on which the motion rests.**

APPEAL from Twelfth Judicial District, San Francisco County.

C. H. Parker for respondent; James Abee for appellant.

SAWYER, J.—Action upon a street contract in San Francisco. Without including the two married women, "the owners of the major part of the frontage of the lots and lands liable to be assessed" elected to take the work and entered into the contract to do it. This is sufficient. We also think the assignment and the evidence of assignment sufficient to support the finding on that point if the statement on motion for new trial was sufficient to present the point. But it is not, for there is no specification in the statement of either of these grounds of motion.

Judgment affirmed.

We concur: Sanderson, J.; Shafter, J.; Currey, C. J.; Rhodes, J.

## HENDY, Appellant, v. DUNCAN et al., Respondents.

No. 821; June 1, 1866.

**Timber—Right of Purchaser to Enjoin Waste.**—A purchaser of standing timber, who, as to the land itself, acquires no greater right than that of entry and way for the purpose of cutting and removing the timber, has an adequate remedy at law for the destruction or conversion of the timber, and is not entitled to an injunction if the wrongdoers are responsible for their acts.

APPEAL from Fourth Judicial District, San Francisco County.

Crockett, Whiting & Wiggins for appellant; Temple & Thomas for respondents.

For the facts involved in this case, see the case following.

SANDERSON, J.—Counsel for appellant fail to inform the court as to what in their judgment is the legal character or effect of the instrument executed by Duncan to Hendy. No attempt is made to construe that instrument or to define the estate or interest or right, whatever it may be, which Hendy obtained under it. Yet it would seem to be material that a party seeking to enforce rights of some sort under an instrument so anomalous should at least go so far as to inform the court what interest they claim and do so in legal language. The brief of counsel is, as a legal argument, as uncertain and vague as the instrument upon which their right of action is founded. There is no attempt to give a legal name to the right which they assert nor to assign the document under which they claim to any known class of legal instruments. The inference or conclusion or, in other words, the third proposition of a syllogism, is given, but the premises, the first two and more important propositions, are entirely omitted. Counsel assume that Hendy acquired some right which entitles him to the relief which he asks but do not define that right. Under these circumstances it would be no injustice to the appellant should we dismiss the appeal upon the ground that no points or authorities have been filed, for we are left

to guess as to what the theory of counsel may be. It is not for us to speculate as to theories upon which an action may or may not be maintained and then proceed to show their truth or falsity. The first is the duty of counsel; our duty commences with the performance of the last. When counsel of acknowledged eminence present their cases in this manner, it may well be doubted whether there is any theory upon which their cases can be sustained.

Whether the instrument amounts to a conveyance in fee of a millsite or a lease or a mere license to erect a mill upon Duncan's land; whether it amounts to an absolute sale of all the timber growing upon Duncan's land with a right to enter, cut and take away, or a mere license to do so, are material questions to be determined, yet we are left wholly in the dark as to which of the foregoing theories the appellant relies on, or whether he relies upon all or none of them, or upon some other theory which does not occur to us.

The action is for an injunction to restrain the commission of waste by the cutting of timber. As to the land upon which the timber stands Hendy certainly acquired no greater right than that of entry and way for the purpose of cutting and removing the timber; and, that being so, as to the timber he could have acquired no greater right than that of a purchaser. Treating him, then, as having no interest but as a purchaser of standing timber merely, he cannot maintain this action for two reasons: 1st. As to him the cutting of the timber is no waste, for waste, as defined by Lord Coke, "is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments to the disinherison of him that hath the remainder in fee simple or fee tail"—which Hendy has not; 2. Being a mere purchaser of the timber, he has adequate relief at law for its destruction or conversion for aught that appears in this complaint, for it is not pretended that defendants are not responsible for any wrongs which they may commit.

That the instrument is not an absolute conveyance of any land does not seem to admit of any doubt. If the instrument be regarded as a lease of the land for the purposes of the lumber business, it is for a perpetual term, and therefore void under the statute. If it be regarded as a license, it has never been acted on, and is therefore revocable at the pleasure

of Duncan. In any aspect, therefore, in which the case suggests itself to our minds, the judgment must be affirmed.

Ordered accordingly.

I concur: Sawyer, J.

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HENDY, Appellant, v. DUNCAN et al., Respondents.

No. 821.

**Timber—Conflicting Rights of Purchasers.**—If a land owner, after making a sufficient conveyance of a millsite and mill rights, with the right to enough timber on the land to supply the mill, gives a license to another person, who has knowledge of the conveyance, to cut timber on the same land and carry it away, when there is on the land only timber sufficient to supply one mill, the mill owner may sue both the land owner and the licensee for such damage as he can show as the result of performance under the license.

APPEAL from Fourth Judicial District, San Francisco County.

Crockett, Whiting & Wiggins for appellant; Temple & Thomas for respondents.

CURRY, C. J.—The plaintiff alleges in his complaint that the defendant Duncan bargained, sold and conveyed to him, by an instrument in writing under seal, the right to erect a sawmill on Wahalla river upon the land of Duncan, with the privilege of using the water-power of the river to propel the mill and other necessary machinery for the manufacture of lumber, and also the right and privilege of cutting and taking from the same land all the timber necessary to supply the mill, with the right of way over Duncan's land for the purpose of his lumbering business. He further alleges that there is no more timber on the land than sufficient to supply one sawmill, yet nevertheless the defendants "are proceeding to despoil and waste the said timber, and have already carried away and converted to their own use a large quantity thereof, and threaten to continue to cut and destroy said timber," which will render utterly valueless the right secured to the

plaintiff under and by virtue of said instrume
tiff then avers that the timber already cut, ca
converted to their own use by the defendants
of five thousand dollars, for which sum he
against them. He also prays that the defe
perpetually enjoined from the commission of
upon the timber," etc.

To the complaint the defendants demurred
the ground, first, that there is an improper j
defendants, and, second, that the complaint
facts sufficient to constitute a cause of ac
sustained the demurrer, with leave to the pl
his complaint, which he declined to do, and
ment final was rendered for the defendants.

The complaint contains an allegation tha
the right to cut and appropriate the timber u
therefor from Duncan; but that if he has any
same was obtained after said deed of barga
executed and recorded and with full notice

If the plaintiff had any right of action f
leged, then in my judgment he had a right
the defendants jointly; and that his complai
and sufficient cause of action for damages f
and converting to their own use the timber wh
a valuable consideration had sold and conveyed
is, to my mind, clear beyond doubt. The pla
the timber which the defendants had, at the ti
mencement of the suit, cut, carried away an
their own use was of the value of five thousa
which sum he demanded judgment. He also p
equitable interposition of the court by injunct
judgment he has not stated the facts necessary to
such relief. He does not state facts showing th
at law would not be ample and adequate for all i
he might sustain by the commission of the wrong
My opinion is that the judgment should be reve

SHAFTER, J., Concurring.—The counsel for t
does not claim that the complaint can be mainta
ground that it makes a case in damages, and it

fore be considered that he waives an examination of the case in that aspect; and it may be fairly inferred also that the point was neither passed upon nor made in the court below. I therefore concur in the judgment.

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## In the Matter of the Estate and Will of DANIEL G. BOWEN, Deceased.

No. 906; July 9, 1866.

**Process—Constructive Service—Compliance With Statute.**—When a mode of service of process, other than personal service, is adopted, a strict compliance with the conditions imposed by the statute must be shown, or the service will be bad.

**Process.—A Proof of Service by Mail That Fails** to state that the party for whom the service was to be made resides in the place of the mailing, and that the party upon whom the service was to be made resides in the place of the address, is defective under the statute.

See Will of Bowen, 34 Cal. 682.

SANDERSON, J.—Counsel for appellant seem to have misapprehended the status of the case in this court. It stands before us on motion of the respondent to dismiss the appeal upon sundry grounds specified by him in writing and duly filed under the thirteenth rule of this court, among which is that the transcript shows no service on him of the notice of appeal, and that the appeal was not taken in time. The case has never been submitted on its merits, but was continued at our suggestion, being impressed with the idea that the respondent's motion must prevail, to await its decision. Counsel for the appellant has, however, filed a brief on the merits, but containing very little upon the only questions now before us, and nothing at all upon the question as to whether the record shows service of the notice of appeal, and whether the appeal was taken in time.

1. The record fails to show service of the notice of appeal. Service was attempted by mail under sections 520, 521 and 522 of the Practice Act. Where a mode of service other than

personal is adopted, a strict compliance with the conditions of the statute must be shown or the service will be bad. The conditions upon which service by mail may be made are: 1. The party serving and the party to be served must reside at different places; 2. There must be a regular communication by mail between those places; and 3. The notice must be deposited in the postoffice addressed to the party to be served at his place of residence and the postage paid. The proof of service is defective in not stating that the parties reside in different places. It fails to show that M. S. Chase, who makes the service, resides at Martinez, where the notice was mailed, and that Messrs. Clarke & Carpentier, the parties upon whom service was to be made, reside at San Francisco, the place of address: Anonymous, 1 Hill, 217; Anonymous, 25 Wend. 677; Birdsall v. Taylor, 1 How. Pr. (N. Y.) 89; Bross v. Nicholson, 1 How. Pr. (N. Y.) 158; Schenck v. McKie, 4 How. Pr. (N. Y.) 246; Peebles v. Rogers, 5 How. Pr. (N. Y.) 208; Jackson ex dem. Norton v. Gardner, 2 Caines (N. Y.), 95; Jackson v. Giles, 3 Caines (N. Y.), 88; Paddock v. Beebee, 2 Johns. Cas. (N. Y.) 117.

2. The point that the appeal was not taken in time is untenable. The notice was filed in the clerk's office and a copy deposited in the postoffice on the last day for appeal. This was sufficient. In the case of service by mail, the time for making service is extended one day for every twenty-five miles of distance between the place of deposit and the place of address: Sec. 522.

Appeal dismissed.

We concur: Sawyer, J.; Rhodes, J.; Shafter, J.; Currey, C. J.

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FAY, Respondent, v. LAWLER, Appellant.

No. 964; July 9, 1866.

**Appeal.—A Judgment on a Verdict not Unwarranted by the evidence is not to be disturbed.**

APPEAL from Seventh Judicial District, Sonoma County.

George Pearce for respondent; W. D. Bliss for appellant.

CURREY, C. J.—This action was brought to recover damages for trespasses alleged to have been committed by the defendant's sheep on the lands of the plaintiff in the county of Sonoma. The defendant by answer denied the allegations of the complaint and further specially pleaded an accord and satisfaction. The cause was tried before a jury, who rendered a verdict for the plaintiff in the sum of two hundred and fifty dollars, upon which judgment was entered. A motion for a new trial was made in due time and the same was overruled. There was much evidence given by the parties respectively on the trial, and from an examination of it we cannot say the verdict was not warranted by it.

The first section of the act passed in 1862, entitled "An act to restrict the herding of sheep in certain counties of this state" (Laws 1862, p. 490), reads as follows: "It shall not be lawful for any person or persons owning or having charge of any sheep within the counties of Mendocino, Lake, Sonoma and Marin, to herd the same or permit them to be herded on the land or possessory claims of other than the land or possessory claims of the owners or herders of such sheep." There was evidence before the jury from which they could properly find that the defendant permitted his sheep to be herded on the plaintiff's land, and the question was fairly submitted to the jury for their determination and also as to the amount of damage which the plaintiff sustained by reason of the trespasses.

We are of opinion the several questions of law raised on behalf of the defendant are not well taken, and that the judgment should be affirmed.

Judgment affirmed.

We concur: Sanderson, J.; Rhodes, J.; Shafter, J.; Sawyer, J.

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CREIGHTON, Respondent, v. LAWRENCE, Appellant.

No. 900; July 10, 1866.

**Street Law.—A Resolution of Intention to Grade a Street Passed** by the board of supervisors of San Francisco, prior to the act of April 25, 1862 (Stats. 391), must be presented to the president of the board in order to justify a subsequent lien for street assessments against an adjacent property holder.

SANDERSON, J.—The controlling question in this case was decided in favor of the appellant in Creighton v. Manson, 27 Cal. 614. We there held that a resolution of intention to grade a street, passed by the board of supervisors of the city and county of San Francisco prior to the passage of the act of the 25th of April, 1862 (Stats. 391), must be presented to the president of the board for his approval, and that without such approval no lien for street assessments could be enforced against adjacent lots. We are asked to overrule that case but we can see no good reason why that should be done.

The order denying a new trial is reversed and a new trial granted.

We concur: Rhodes, J.; Shafter, J.; Currey, C. J.

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MAYNE, Respondent, v. JONES et al., Appellants.

No. 840; July 12, 1866.

**Ejectment.—A Verdict in Ejectment Awarding the Plaintiff Possession is not to be disturbed when based on substantially sufficient evidence.**

APPEAL from Twelfth Judicial District, San Francisco County.

Williams & Thornton for respondent; H. B. Jones for appellants.

SANDERSON, J.—Ejectment founded on prior possession. The plaintiff recovered, and we are asked to set aside the verdict upon the ground that the testimony fails to make out a prior possession. But we think that the testimony of some of the witnesses on both sides tends to show a substantial inclosure prior to and at the time of the defendant's entry. It is true that at or about that time two gaps, one on the north and the other on the south line, had been made in the fences for the purpose of constructing the Point Lobos road, and no fences had yet been put along the line of the road; but this

circumstance alone should not be allowed to defeat the plaintiff's possession or deprive him of the benefit of his inclosure if otherwise sufficient, as the reason and purpose of the gaps is fully explained and the plaintiff ought not to be held responsible for an act beyond his control. Upon this evidence the jury may well have found a substantial inclosure, and if so the court would not be justified in setting the verdict aside.

Order affirmed.

We concur: Shafter, J.; Rhodes, J.; Currey, C. J.; Sawyer, J.

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## SHIPLEY, Respondent, v. LARRIMORE, Appellant.

No. 580; July 13, 1866.

**Appeal—Conflicting Evidence.—A Judgment upon Findings** of a jury upon conflicting evidence should not be disturbed.

**Broker.—In an Action by a Broker Against a Customer** who, after an alleged purchase of stock for him by such broker at his request, has repudiated the transaction, evidence that the plaintiff did not, when buying the stock, name the defendant to the vendor as the real purchaser, is immaterial.

**Broker.—Buying Stock in His Own Name Without the Consent,** knowledge or ratification of the particular customer for whom he buys is not a conversion of the stock by the broker, and it is not a waiver of the contract had with the customer to buy for him.

**Broker.—In the Trial of an Action by a Broker** for the price of stock purchased for the defendant at his request, the defendant cannot, under an answer that denies he ever made such a request, introduce evidence to show that the plaintiff waived the request to buy for him and had bought for himself, or had converted the stock.

**Broker—Conversion.—The Sale by a Broker, Under the Rules** or custom of the board of brokers, of stock in his hands for which the customer has not paid, the customer being given timely notice in contemplation of such sale, does not amount to a conversion.

SAWYER, J.—This is an action to recover the sum of two thousand eight hundred and seventy-five dollars, for moneys paid, laid out and expended by the plaintiff for and on account of defendant at his request. Also fifty dollars for the services of the plaintiff rendered at defendant's request in the

purchase of certain mining stocks. The cause of action is stated in the usual form of the common counts applicable to such demands, and the answer consists simply of denials of the allegations of the complaint. Plaintiff recovered and defendant appealed. The parties were examined on their own behalf, and the testimony of the plaintiff tended to show that defendant employed plaintiff, a stock broker, to purchase shares in a certain mining company; that plaintiff made inquiry as to what the stock could be bought for, and having ascertained the price reported it to the defendant; that defendant directed him to purchase ten shares at a price not exceeding a sum named, on thirty days' time, twenty per cent to be paid down; that he made the purchase at a few dollars less than the amount authorized, and a few minutes after reported the purchase to defendant, who was satisfied with it, and promised to bring the twenty per cent advance on Monday morning—the purchase having been made late Saturday evening; that on Monday morning defendant said that he was disappointed in getting the money to pay the advance; that plaintiff then informed him that the stock had advanced, and he could sell so as to make for him some four hundred dollars, and advised a sale; that defendant expressed an opinion that the stock would go to a much higher figure, and asked plaintiff to advance him the money to make the payment, and thus enable him to hold the stocks, promising to secure it by a conveyance of some real estate; that plaintiff thereupon made the advance for the benefit of defendant and at his request, and on the same day, after the interview with defendant, signed a written contract with the seller for the purchase, but in his own name, and the stock was deposited with Donahoe, Ralston & Co., bankers, subject to plaintiff's order on payment of balance; that on the following day plaintiff and defendant met again, when defendant declined to execute the conveyance agreed upon, saying there was litigation about the property intended to be conveyed; that he then knew the advance had been made, and said "he would fix it in a few days"; that plaintiff saw no more of defendant till the 8th of February, the day on which the balance of purchase money fell due, when he again appeared in response to a note addressed to him by the plaintiff in regard to the matter and repudiated the whole transaction; that plaintiff then offered

him the stocks, and demanded payment, which was refused by defendant, who denied that they were purchased by his authority; that plaintiff had the stocks in his possession at the time; that plaintiff told him that he should sell the stocks in the board of brokers and sue defendant for the difference; and informed defendant that it was customary to sell delinquent stock in the board; that he did sell, either on that or the following day, in the evening board, at a large loss. Plaintiff's testimony was corroborated in many material particulars by other testimony.

The defendant in his testimony admitted conversations about the purchase, but denied that he employed or authorized plaintiff to make the purchase; or that he requested him to make the advance; or that he promised to deed the real estate as security, and he wholly repudiated the purchases. On this conflicting evidence the jury found the facts for the plaintiff, and the verdict, so far as the facts are concerned, must control the decision.

On this state of the pleadings and evidence, the points made and discussed by the appellants do not appear to me to arise in the case.

The first point is, that "The contract (the written contract of purchase signed by the vendor and plaintiff) was not the contract of defendant, because under seal, and the defendant nowhere appears as a party to it, and the plaintiff nowhere appears as the agent of the defendant." But the question is not whether the vendor could maintain an action on that instrument against the defendant in this suit. This suit is on a contract alleged to have been made by the defendant with the plaintiff by which the plaintiff purchased certain stocks for the defendant and advanced the money to pay for them at defendant's request. The plaintiff alleges that he did make the purchase and advance at defendant's request, and the defendant denies it, and the jury find against the defendant on the issue. It does not matter that the plaintiff, in dealing with other parties, made the purchase in his own name. He purchased stocks for the defendant and had them to deliver. The defendant found no fault before suit brought because the plaintiff made the purchase in his own name. He put his refusal to take the stocks on other grounds. The plaintiff himself also advanced the money to pay for the stocks at de-

fendant's request, and, unless there was some agreement to the contrary, he was entitled to hold them until reimbursed: Horton v. Morgan, 19 N. Y. 172, 75 Am. Dec. 311. But defendant denied that he employed the plaintiff to purchase at all, or that he requested him to make the advances. This is the sole ground upon which he repudiates the transaction.

The second point is, that the act of the plaintiff in buying the stock in his own name, without the consent, knowledge or ratification of the defendants, is a conversion of the stock by the plaintiff, and a waiver of all claim for advances and commissions. And the third: That the premature sale of the stocks in the board by the plaintiff without the knowledge of the defendant, or notice to him, was a conversion.

As to the second point, we are not authorized by the record to say that the purchase in the name of the plaintiff was without the consent, knowledge or ratification of the defendant. But there is no question of conversion in the case. No such defense was set up in the answer. The defendant did not claim, and does not now claim, that he ever had any interest in the stocks. His whole defense is upon the theory that he did not employ plaintiff to make the purchase, or request him to advance the money, and did not have any right to the stocks. He repudiated the authority to purchase at all, or to advance money on his account. He did this before the sale of the stocks while they were still in the possession and under the control of plaintiff, and refused to take them or pay for them on that ground, and no other. He did not claim the stocks or any interest in them. He said he never employed the plaintiff to buy any stock, or requested him to advance money on his account, therefore he would not have anything to do with them, nor did he claim the stocks on the 9th, or at any time after, nor does he now claim them. His defense and testimony to support it all goes upon the theory that there never was any agreement between him and plaintiff of any kind whatever in relation to the subject matter. On this ground he planted himself, and on this ground he must stand or fall. There was no agreement that plaintiff should wait thirty days for his advance. The thirty days' time was given on the purchase of the stocks, and before the expiration of this time defendant declined to take them, and left the stocks on the plaintiff's hands. As defendant refused to take and

claimed no interest in them, plaintiff was not bound to hold them longer subject to his order. There was already a breach of contract on the part of defendant. The plaintiff could not be required to hold the stocks at his own risk on a rapidly falling market after the defendant had repudiated the purchase, and refused to take the stocks on the ground that he had never authorized the purchase. Had the defendant not repudiated the purchase, and the plaintiff had then sold the stocks, the question would have arisen whether they were improperly sold or not. For similar reasons the fourth point is untenable. The whole case as presented by the record is in substance this: The plaintiff at the request of defendant, and on defendant's account, purchased certain mining stocks in part on time, and advanced the necessary portion of the purchase money. The stocks before the day for paying the balance of purchase money fell in the market, and the defendant refused to take them and repudiated the authority of plaintiff to purchase. The plaintiff thereupon, after informing defendant that he should do so, sold the stocks in the stock board at a loss, and sued the defendant for the difference between the amount paid and that received for the stocks. And I think he was entitled to recover.

There is no point specified in the statement that the amount of the verdict is more than the evidence justifies.

Judgment affirmed.

We concur in the judgment: Sanderson, J.; Shafter, J.

CURREY, C. J.—I differ too widely from the opinion of my brother Sawyer in reference to the questions of law in this case to rest contented without expressing my own views in relation thereto; and in assigning the reasons on which my individual judgment is founded I deem it proper to state the material facts of the case, as I understand them to be disclosed by the record.

The plaintiff, a stock and exchange broker, sued the defendant for work, labor and services by the plaintiff rendered and performed for and on account and at the request of the defendant in and about the purchase of one Williams of ten shares of the stock of "Real del Monte Gold and Silver Mining Company." This work, labor and services it is alleged in the plaintiff's complaint was reasonably worth the sum of fifty

dollars, and the plaintiff also sued in the same action for the sum of two thousand eight hundred and seventy-five dollars for so much money by him paid, laid out and expended to and for the use and benefit of the defendant and at his request, which it is alleged the defendant, in consideration thereof, promised to pay him with interest thereon at five per cent per month, when he should be thereunto afterward requested. The defendant, by answer, traversed each and every material allegation of the plaintiff's complaint. Upon a trial before a jury a verdict was found for the plaintiff in the sum of two thousand eight hundred and seventy-five dollars, which the defendant sought without success to have set aside on a motion for a new trial. The substance of the plaintiff's testimony given upon the trial is that on the 9th of January, 1864, the defendant employed him to purchase of Williams ten shares of said stock at a sum not to exceed three hundred and ninety dollars per share, upon a credit of thirty days, except as to twenty per cent of the price. That thereupon the plaintiff made the purchase in his own name at three hundred and eighty dollars per share, upon a credit of thirty days for eighty per cent of the price, and soon thereafter, at defendant's request, advanced and paid to Williams the twenty per cent then due. Upon the purchase being made, the defendant expressed himself satisfied with it, and some three days thereafter promised to arrange for the advancement of the twenty per cent which the plaintiff had made. The parties did not meet again until the 8th of February following, when, in answer to a letter from the plaintiff requesting the defendant to take up the stock, the latter called upon the former at his place of business. The defendant so called at about half after 4 o'clock in the afternoon of the day with the letter which he had received from plaintiff and asked what it meant, in reply to which the plaintiff told him: "It meant what it said, that he should pay for the stock." The plaintiff testified that thereupon he informed the defendant that he had paid for the stock, and then offered it to him and demanded the money due him for it. Upon which the defendant said he did not owe the plaintiff anything, and repudiated the whole transaction in respect to the stock. Previous to this conversation on the same day the plaintiff had caused the stock to be sold at the evening board of brokers for ninety-two dol-

lars per share, and this conversation between the parties was very soon after such sale. It does not appear that the defendant was aware at the time that the stock had been sold, nor had he any reason to so believe, because, after the same had been sold, the plaintiff told the defendant he would have the stock sold subject to the rules of the board of brokers and then sue him.

In dealing with Williams the plaintiff did not disclose the name of his principal, but contracted in his own name. The contract between the plaintiff and Williams was in writing, dated on the 9th of January, 1864. It recites a purchase by the plaintiff of ten shares of the Real del Monte Company's stock at the sum of three thousand eight hundred dollars, of which seven hundred and sixty dollars had been paid. Then follows the plaintiff's promise to pay three thousand and forty dollars—the balance of the price—within thirty days from the date of the contract; and next follows the promise of Williams to deliver the stock to the plaintiff within the time specified upon payment of the last-mentioned sum.

The relation between the defendant and plaintiff was upon the plaintiff's showing that of principal and agent. The plaintiff was employed to purchase the stock for the defendant, and did so in his own name, according to the custom of brokers. He paid at the defendant's request the twenty per cent to be paid in advance, and on the 8th of February he paid the balance, as he was bound to do under his contract with Williams. When the stock was delivered to the plaintiff by Williams it became transferred to him: Story on Agency, secs. 155, 160a; Horton v. Morgan, 19 N. Y. 172, 75 Am. Dec. 311; which he thereupon held under an obligation to transfer it to the defendant upon payment of the amount due for the same, according to the contract between them. The defendant was under no obligation at any time to part with any greater sum than twenty per cent of the contract price without the transfer of the stock to him, and when the demand was made of him to pay for it, the plaintiff was bound to have the stock ready to be transferred upon receiving the money due for it and on its account. The defendant had all of the last of the thirty days in which to perform his engagement, and notwithstanding he disavowed having contracted with the plaintiff as alleged, and denied that he owed any-

thing, still in order to hold him to his contract and compel him to pay the price which had been advanced by the plaintiff, the latter was bound, in fulfillment of the contract on his part, to keep the stock or other of the same kind and of equal value on hand for the defendant: Horton v. Morgan, 19 N. Y. 172, 75 Am. Dec. 311. Or, in case he made sale of it, he could do so properly only after the demand of the price due and a tender of the stock, and after due notice to the defendant of the time and place of sale. Instead of holding the stock ready to be delivered to the defendant upon payment, the plaintiff caused it to be sold at the board of brokers without notice to the defendant of any intended sale, and this is attempted to be justified on the ground that such course was according to the custom of brokers. There is no allegation in the complaint of any custom of the board of brokers in such cases. The complaint is simply for work, labor and services rendered and performed by the plaintiff for the defendant at his request in and about the purchase of the stock of Williams, and for money paid, laid out and expended for the use and benefit of the defendant at his request, without even specifying for what. The plaintiff testified that at the interview between the parties on the 8th of February, he told the defendant that it was customary to sell delinquent stock in the board, and he then testified further that by the rules and customs of the board of brokers, a member who fails to meet a time contract is reported and the stock sold. He did not pretend that he was authorized to cause the stock to be sold at the board of brokers without notice to the defendant. On the contrary, he testified that the defendant did not give him any special order to have the stock sold. No custom of the board of brokers authorizing a sale of the stock in question at the board on the defendant's account was proved. The plaintiff testified that by the rules and customs of the board, a member is reported in case he fails to meet a time contract and the stock is then sold. The defendant was not a member of the board, and consequently the rules and customs mentioned had no application to him.

The plaintiff has cited and relies on the case of Whitehouse v. Moore, 13 Abb. Pr. (N. Y.) 142, as justifying the course which he pursued. In that case it was held by a single judge at special term that where the defendant employed the plaintiff as his broker and agent to purchase certain stocks, and

advanced to him a certain sum on account, and the plaintiff having made the purchase was compelled to pay the whole amount, he had the right, upon the defendant's omission to pay the balance due for the stocks, to sell the same in accordance with the custom of brokers in such cases, without notice to or demand upon the defendant or tender of the stocks to him, and that thereupon he was entitled to recover the difference between the purchase price and that at which the stocks were so sold. The question decided arose upon demurrer to the complaint which alleged that the course pursued was in accordance with the custom of brokers in such cases. The learned judge referred to the case of Merwin v. Hamilton, 6 Duer (N. Y.), 249, as a full and decisive authority in support of the demurrer unless the allegation of the custom of brokers prevented its application. Merwin v. Hamilton was decided by a full bench, of which the eminent Judge Duer was one. In the last-named case it was held, first, that a broker, who is employed to purchase stocks and is authorized by usage or express agreement to make the purchase in his own name without disclosing the name of his principal, has no right to maintain an action against his principal for not furnishing him with money to pay for the stocks without showing that he had demanded payment of the price and had transferred or offered to the principal the stocks purchased. Second, that the transaction is in law precisely the same and is governed by the same rules that would have applied had the contract been an immediate sale from the broker as seller and his principal as buyer. That the payment of the price and the transfer of the stocks are simultaneous acts and conditions mutually dependent. Third, that if the broker sells the stocks without demanding payment of the price, and without transferring them or offering to transfer them to his principal, and without notice of his intention to sell, he thereby disables himself from making the necessary transfer or tender and in effect converts the stocks to his own use, and loses any right of action against his principal which he might otherwise have had.

It is not necessary to say whether or not I approve the doctrine of Whitehouse v. Moore, as the question upon which that case was decided does not exist in this. The doctrine laid down in Merwin v. Hamilton is to my mind consonant with sound reason and just principles. In such cases the broker or

agent must demand the price due and offer a transfer of the property upon payment, and if he resorts to a sale of it, in case of a refusal of the principal to pay, he must do so after demand of the price and tender of the property, and after due notice of the time and place of sale. The evidence shows that at the time the action was commenced the plaintiff had sold the stock, without notice to the defendant of the time or place of sale. The defendant was as much interested in a fair and just sale of the property as would be the pledgor in the sale of a pledge by the pledgee. Where a pledgee undertakes to sell pledged property without resorting to a foreclosure in equity, the law requires that notice to the pledgor to redeem, and of the time and place of the sale, in case no redemption is made, shall be duly given: Stearns v. Marsh, 4 Denio (N. Y.), 230, 231; Wheeler v. Newbould, 16 N. Y. 392; Brown v. Ward, 3 Duer (N. Y.), 660; Lewis v. Graham, 4 Abb. Pr. (N. Y.) 106. I do not perceive any reason why the same rule should not apply to the case under consideration. The plaintiff undertakes to meet and remove the obstacle in his way by interposing the conduct of the defendant in repudiating the contract, as obviating the necessity of any notice of the sale; and he insists that the notice of sale was unnecessary on the ground that, if it had been given, it would have been disregarded by the defendant. The court cannot, nor has it the right to, say that it would. The law has prescribed the rule to be observed in such cases, which is reasonable and just, and which we have not the right to evade.

By causing the stock to be sold without notice to the defendant, the plaintiff lost the right of action which he otherwise might have had against the defendant.

In my judgment the order refusing a new trial should be reversed and the court below directed to grant the defendant's application therefor.

RHODES, J.—In my opinion the contract between the parties is to be governed by the rules that would be applicable had the plaintiff contracted to sell the stock to the defendant; and the stock having been sold before the expiration of the thirty days' credit given to the defendant, and without notice to him of the time and place of sale, he was not liable to the plaintiff for the contract price, and I think the judgment should therefore be reversed and a new trial ordered.

RAND, Appellant, v. HASTINGS et al., Respondents.

No. 713; July 16, 1866.

RAND v. LEE et al.

No. 714.

**Mortgage.—An Instrument Signed by a Creditor** and delivered to the debtor cannot be deemed a mortgage.

**Vendor and Vendee—Mutuality of Contract.**—Where one party has promised to convey land to another upon payment of the price, together with taxes, interest, etc., but there is nothing to show that this other has, on his part, promised to pay accordingly, there is no mutuality apparent in the transaction and no right of action accrues to this last party as for the enforcement of a contract.

**Mortgage—Abandonment by Mortgagor.—A** Mortgage cannot be Satisfied or extinguished by an abandonment on the part of the mortgagor.

**Payment.—Payment in Gold Coin is not Obligatory** unless made so by the terms of the contract calling for money to be paid.

**Improvements Put on Land by One Having** Notice of Equities in the land enjoyed by another are, unless made at this other's request, voluntary and gratuitous.

APPEALS from Seventh Judicial District, Solano County.

Patterson & Stow for appellant; S. F. and J. Reynolds and W. S. Wells for respondents.

RHODES, J.—These are cross-appeals in the same case. Hastings, being the owner of block No. 300 in the town of Vallejo, bargained and sold the same to one William Likens, and agreed to convey the same to him, on his paying the purchase money. On the 4th of March, 1859, Likens, by an agreement in writing, undertook to convey to the plaintiff lots Nos. 7 and 8, in said block, upon his paying to Likens sixteen hundred dollars, and interest at two per cent per month within twelve months from date, which amount the plaintiff agreed to pay. The plaintiff immediately took possession of the lots and proceeded to erect thereon a hotel. On the 9th of April, 1860, Likens conveyed those lots to Hastings, the purchase money payable by the plaintiff to Likens

being then unpaid; and on the 13th of June following, the plaintiff being indebted for the amount of the said purchase money, and being also indebted to divers persons in sums which with the said purchase money, and a small sum then advanced by Hastings, amounted to six thousand dollars—Hastings executed to the plaintiff the instrument which is designated by the parties as "Exhibit A." The matter of the greatest importance in the case is to determine the character of this instrument—the plaintiff contending that it is a mortgage by the plaintiff to Hastings, and the defendant insisting that, at the best, it is only a contract of sale by Hastings to the plaintiff.

It is a conclusive answer to the position that it is the mortgage of the plaintiff to say that the plaintiff did not execute the instrument, nor did he at the time of the making of the instrument or at any other time convey or transfer by way of mortgage or otherwise any right, title or interest in the premises to Hastings. If this instrument is the mortgage of the plaintiff, it is the only instance to be found in the annals of the courts in which the alleged mortgage was executed by the mortgagee alone and delivered by him to the mortgagor.

The case having been disposed of upon the erroneous theory that "Exhibit A" was a mortgage, we shall not enter into an extended discussion of the points presented on appeal. The record is not in such a condition that we can determine whether the contract contained in "Exhibit A" can be enforced against Hastings or the other defendants. It appears on its face to be a contract, on the part of Hastings, to convey the premises to the plaintiff upon his making payment at a certain time of six thousand dollars, and the taxes, insurance, etc., with interest on the amount at a specified rate; but because of the absence from the case of facts necessary to show a contract on the part of the plaintiff to purchase the premises from Hastings and pay him the purchase money, we cannot say whether there was or was not such mutuality in the undertaking of each party as is essential to enable him to enforce the performance against the other.

If it shall be found that the contract has been so made that it can be enforced, a point made by the defendants becomes material. The evidence set out in their bill of exceptions tends strongly to show that the plaintiff abandoned all claim to the

property, and relinquished whatever right he may have had to a conveyance upon paying the purchase money before Hastings sold the premises to defendant Lee. The issue of abandonment was tendered by the defendants, but upon holding "Exhibit A" to be a mortgage, that issue became immaterial, and no finding thereon was necessary, for a mortgage cannot be satisfied or extinguished by an abandonment on the part of the mortgagor.

Assuming that the contract was entered into by both parties, and that it was on foot at the time of the commencement of the action, capable of being enforced against the party in default, it is proper to say that the court erred in ordering payment of the amounts found due upon the accounting to be made in gold coin, for there was no contract in writing to make payment in that kind of money. Under the same assumption, it was proper that the plaintiff should be charged with the expenses of repairs, and the amounts paid for taxes and insurance; but he would not be chargeable with the expenses incurred for improvements made on the property after it was purchased by Lee, for if Lee purchased with notice of the plaintiff's equity, improvements thereafter made, unless at the request of the plaintiff, were voluntary and gratuitous so far as the plaintiff was concerned. We do not undertake to specify the items and classify them among repairs or improvements—that duty is for the court below.

For the same reasons that it was erroneous to order judgment in gold coin, it is improper for the court to ascertain the value of the rents and charge the defendants with the same, in any specific kind of money.

Judgment reversed and the cause remanded.

We concur: Sanderson, J.; Sawyer, J.; Shafter, J.

A. WEYLE, Respondent, v. CENTER et al., Appellants.

No. 762; July 16, 1866.

**Van Ness Ordinance.—The Design of the Van Ness Ordinance** was to graft a city title upon a possession, not merely vague, indeterminate and floating, but actual, bona fide and exclusive, evidenced by acts clearly showing a segregation of the land and a subjection of it to the will and dominion of the claimant.

**Ejectment—Evidence.—A Verdict, the Effect of Which is to Deprive** a party of his actual possession, ought to be found only from evidence affirmative and squarely to the point.

APPEAL from Fourth Judicial District, San Francisco County.

Sharp & Lloyd and G. F. Sharp for respondent; Wilson & Wilson and Edward Tompkins for appellants.

See Caldwell v. Center, 30 Cal. 540, 89 Am. Dec. 131.

SANDERSON, J.—This is an action to recover Lot No. 2, in what, as claimed by the plaintiff, is called the Foley tract, in the city of San Francisco. The action is founded upon prior possession under the Van Ness ordinance. The plaintiff claims under a series of conveyances commencing with Michael Foley, who was, as he alleges, the first possessor, while the defendant claims under John Wilson as the prior possessor. The alleged prior possession of Foley dates from 1850, and that of Wilson from June, 1853.

Several exceptions were taken to the admission in evidence of the various deeds in the plaintiff's chain of title, which under the view which we take of the controlling question in the case (prior possession), we deem it unnecessary to notice. Those deeds are of no consequence unless it be shown that Foley was in the actual prior possession of lot No. 2, within the meaning of the Van Ness ordinance, and we are of the opinion that the plaintiff has utterly failed to show that fact.

Who was in possession of lot No. 2, on or before the first day of January, 1855, within the meaning of the Van Ness ordinance, would seem to be a fact requiring but little evidence to establish. That ordinance was not designed to graft the city title upon a vague, indeterminate and floating pos-

session, but upon an actual bona fide and exclusive possession evidenced by such acts as clearly show a segregation and subjection of the land to the will and dominion of the claimant. So far, however, as this case is concerned, it is unnecessary to inquire what special acts will have that effect, for in our judgment the testimony in this case fails to show any acts whatever on the part of Foley tending to vest him with the actual possession of lot No. 2. But notwithstanding the apparent simplicity of the question, this case is lumbered with a mass of evidence filling over a hundred and fifty pages of printed matter, nearly all of which tends in no respect to throw any light upon the question of the alleged prior possession of Foley of lot No. 2. With the issue thus covered up by a mass of indigestible testimony, it is not surprising that the jury failed to scent the truth. Under the circumstances there could have been no well-grounded hope of their guessing right. It is only by the most patient and repeated sifting that the few grains of wheat to be found in the testimony can be separated from the mountains of chaff beneath which they are concealed.

That Foley had a house situated about a quarter of a mile from the locus in quo, with a garden and corral inclosed nearby, cannot be denied; but where the boundaries to his alleged tract of a hundred and sixty acres were and what they were it is utterly impossible to say, and much less can it be said that lot No. 2 was ever within those boundaries. This want of visible and permanent boundaries may be accounted for, perhaps, upon the ground that Foley seems to have supposed that he could hold a hundred and sixty acres under the survey of his so-called pre-emption right, filed in the alcalde's office in 1849, which was offered in evidence, but excluded by the court. Deeming that a sufficient security, it doubtless was his intention to inclose as fast as his means might enable him or the necessities of his business require.

The testimony of W. Shear upon which the plaintiff relies in part, fails to connect lot No. 2 with Foley's possession. We do not understand the testimony of this witness as it seems to be understood by counsel for the plaintiff. The witness does not state that Foley had a hundred and sixty acres inclosed, and that lot No. 2 was within the inclosure. His statement that "he found the premises inclosed under cultivation" is to

be taken in connection with his other statements. So taken its meaning is obvious. We understand him to mean that the premises inclosed (that is, so far as they were inclosed) were under cultivation; not that the premises—the whole one hundred and sixty acres—were inclosed and under cultivation. He says that Foley claimed one hundred and sixty acres; but he does not state that it was all inclosed or under cultivation, or that there were any visible boundaries showing the extent and exact location of his claim. As to how Foley's possession was defined, he is silent. He merely states that he believes that lot No. 2 is a part of what Foley claimed, without stating any facts tending to show that it was inclosed at any time, or that Foley was ever in the actual possession of it by any other means.

The testimony of Castle, another of plaintiff's witnesses, aside from being incoherent and contradictory, and therefore entitled to but little weight, also fails to connect the locus in quo with Foley's actual possession. He merely states that Foley fenced and cultivated a tract of land east of the county road or Mission street, but the precise location of the land so inclosed and cultivated he does not give, nor does he state that lot No. 2 was a part of it. Like most of plaintiff's witnesses. he indulges in general and vague statements from which it is impossible to form any satisfactory conclusion upon the question involved. And we may as well remark in this connection that the entire examination of the plaintiff's witnesses evinces a reluctance on the part of his counsel to bring them squarely up to the point in issue, as if fearful that if pressed they might fail them. Their testimony is therefore exceedingly blind, and leaves one entirely in the dark as to the true facts. There is occasionally a gleam of light, but so shifting and uncertain as to afford but a glance at short and separate sections of Foley's supposed fences and cultivated fields. On general principles, no verdict depriving another of his actual possessions ought to be found upon testimony of so unsatisfactory a character.

The testimony of Anderson, Stevens and Baker relates to the status of the land and the acts of other parties subsequent to the sale by Foley to Welch, and has therefore no bearing upon the question as to whether lot No. 2 was in Foley's actual possession at any time prior to his leaving the premises.

Portions of the testimony of Mary Rauselle, the stepdaughter of Foley, tends to prove an inclosure and cultivation by Foley of lot No. 2, but she is speaking of events which transpired thirteen years ago, and when she was but ten years of age. By her own statements and the testimony of other witnesses, it is apparent that she was so far mistaken as to render her entire testimony altogether unreliable. She says that her father cultivated land east of Mission street in 1852, yet she is unable to state when Mission street was opened, and it is proved by other witnesses of the plaintiff that it was not opened until 1853, a year after the time at which she says her father cultivated land upon the east side of it and after her father had sold out and quit the neighborhood.

The testimony of Wallace also fails, in our judgment, to show any certain or exclusive possession in Foley to the east of Mission street. Speaking of the inclosure made by Foley in 1851, he states that Foley ran his fence east along the line between himself and Jansen as far as Mission street where he met with a stoppage because of a difficulty with other parties. That there was a tract to the east of Mission street which was in dispute between Foley and other parties, and that Foley fenced a small part of it in the latter part of 1851, but he describes the part so fenced as running down toward Center street, which is in a direction opposite to lot No. 2. But, at best, admitting that this inclosure included lot No. 2, Wallace's testimony shows only a scrambling possession in Foley of any land to the east of Mission street, which does not warrant a recovery, while Lockwood, another of plaintiff's witnesses, testifies that Foley's inclosure never extended east of the east line of Mission street.

We deem it unprofitable to review further in detail the testimony of plaintiff's witnesses. We have noticed those upon whom he chiefly relies and whose testimony is the strongest in his favor, and found that they wholly fail to make a case for the jury, and when taken in connection with the testimony on the part of the defendants the conviction is irresistible that Foley never had, if any, such a possession of the locus in quo as to justify a recovery under the Van Ness ordinance.

Judgment reversed and a new trial ordered.

We concur: Shafter, J.; Currey, C. J.; Rhodes, J.; Sawyer, J.

## In the Matter of JOHN CORBETT on Habeas Corpus.

No. 1033; July 17, 1866.

**County—Changing Boundaries—Title of Statute.**—An act, in effect, to set off part of one county and annex it to another, is sufficiently expressed by a title so worded as to begin with "An act to amend an act," and to continue by a reference expressly to the original act organizing the county thus to be enlarged.

**County—Changing Boundaries.—Taxes on Land Within a Part** of a county taken off for annexation to an adjacent county, levied and becoming a judgment against the owner of the land and a lien upon the latter before the passage of the act effecting the change in county lines, belong to the county from which the part was taken.

P. Van Clief and C. Haymond for petitioner.

SHAFTER, J.—The first question which the case presents relates to the constitutionality of the act of March 31, 1866 (Acts 1866, p. 605), altering the boundaries of the county of Plumas. The effect of that statute, as appears by the stipulation, was to set off a portion of the county of Sierra to the county of Plumas. The unconstitutionality of the act is put upon the ground that the object of the act is not expressed in its title, as required by section 25 of the fourth article of the constitution. The title of the act is as follows: "An act to amend an act entitled an act to organize the county of Plumas out of a portion of the territory of Butte county, approved March eighteenth, eighteen hundred and fifty-four." We consider this to be a clear and unequivocal expression of the object of the act; and it is manifest that its provisions are strictly confined to that object.

It appears from the agreed statement that the board of supervisors of Sierra county levied the county taxes for 1866 in February of that year, and that they became a judgment against the person and a lien against the property assessed on the first Monday in March following, while the territory in dispute was yet a part of the county of Sierra, and some twenty-five days before the passage of the act in question. Under these circumstances the assessment of the taxes for the fiscal year 1866–67, and the collection of them, belongs to

Sierra county, with reference to whose "expenditures" alone the taxes were levied: Moss v. Shear, 25 Cal. 38.

The petitioner must be discharged, and it is so ordered.

We concur: Sanderson, J.; Currey, C. J.; Rhodes, J.; Sawyer, J.

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PEOPLE, Respondent, v. GEO. LOOMIS et al., Appellants.

No. 934; July 17, 1866.

**Criminal Law—Reasonable Doubt.—To be Satisfied Beyond** all reasonable doubt, as under proper instructions of the court a jury must be in order to convict a defendant of crime, is not the same as to be entirely satisfied.

APPEAL from Alameda County.

Attorney General for respondent; Tyler, Cobb & Griffith for appellants.

SHAFTER, J.—The court, having instructed the jury that they must be satisfied from the evidence of the prisoner's guilt beyond all reasonable doubt before they could convict him, were requested by the defendant's counsel to further instruct the jury as follows: "A reasonable doubt is that state of mind of a reasonable man that would induce him to say that I am not entirely satisfied from the evidence that the defendant and no other or different person committed the offense; and if the jury have such doubt they will find the defendant not guilty."

According to this exposition a reasonable doubt and a lack of entire satisfaction are identical. Now the mind may be convinced not only to a moral certainty but to the highest degree of moral certainty, and yet not be, in the language of the instruction, "entirely satisfied." The instruction goes to the conclusion that the jury could not convict if they had any doubt. The instruction called not for moral certainty, but for that certainty which comes only of demonstration.

This is the only point made for the appellant requiring consideration.

Judgment affirmed.

We concur: Sanderson, J.; Rhodes, J.; Currey, C. J.; Sawyer, J.

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**PAGE**, Appellant, v. **O'BRIEN** et al., Respondents.

No. 959; October 3, 1866.

**New Trial.—In the Absence of an Affirmative Showing of Error**, it must be presumed that in disposing of a motion for a new trial the trial court, which had all the evidence before it and best could judge of its effect, ruled correctly.

**APPEAL** from Seventh Judicial District, Solano County.

**W. S. Wells** for appellant; **M. A. Wheaton** for respondents.

**SAWYER, J.**—This action was instituted against several defendants to recover portions of the Suscol Rancho. The plaintiff obtained a verdict, and the court subsequently granted a new trial as to O'Brien, one of the defendants. The appeal is from this order. The ground upon which the new trial was granted does not distinctly appear, but it would seem that the plaintiff recovered the entire tract claimed, whereas the evidence appears to show that there was a small portion outside of plaintiff's fence of which he had not been in possession, but which had been continuously in the possession of O'Brien. The record does not contain the plats which were used, and to which some of the evidence refers in such terms that we cannot tell what precise bearing it had upon the possession of this portion of the land recovered. The district judge had the entire evidence before him, and could better judge of the effect of the evidence, and in the absence of an affirmative showing of error his ruling must be presumed to be correct. We cannot perceive from the record that in granting a new trial

The order is therefore affirmed.

We concur: Shafter, J.; Rhodes, J.; Sanderson, J.

## PEOPLE ex rel. CALDERWOOD, Relator, v. HENRY L. DAVIS, Respondent.

No. 895; October 4, 1866.

**Quieting Title.—A Judgment in a Suit to Quiet Title has equal efficacy with one in ejectment to establish the rights of the parties.**

**Quieting Title.—A Judgment in a Suit to Quiet Title in favor of the unsuccessful defendant in a preceding action of ejectment between the same parties is suspended in its operation by an appeal.**

**A Mandamus to Direct an Officer to Execute a Writ of Possession against an occupant, unsuccessful as defendant in ejectment, will not be granted if, since the judgment in ejectment, the occupant has been given judgment in a suit to quiet title, although it is claimed in the petition that an appeal from the latter judgment has been taken and its operation thereby suspended. The burden is on the relator to prove the appeal as a fact.**

Mandamus.

D. Calderwood for relator; D. Rodgers for respondent.

SHAFTER, J.—The petition states that the relator brought an action of ejectment against R. C. Brooks et al., tenants of the relator holding over after the expiration of their lease. That one Edmond Brooks "forcibly entered" upon the land pending the litigation and "ousted the said defendants therefrom." That Edmond Brooks, so being in possession, assumed the defense of the action, and by collusion with said R. C. Brooks filed an answer in his name denying all the material allegations in the complaint, and pleaded as a special defense the entry and ouster by Edmond Brooks under paramount title. It is further stated that the relator recovered judgment in said action on the 24th of November, 1863, for the possession of said premises; that Edmond Brooks moved for a new trial in the name of R. C. Brooks, and on denial of the motion appealed in his name to the supreme court, where the judgment was affirmed. That a writ of possession duly issued on said judgment and was delivered to the defendant on the twenty-sixth day of July, 1865, who refused to execute it on payment of fees.

The answer admits these facts, in effect, and states by way of avoidance that after the ouster of R. C. Brooks and others by Edmond Brooks, which it is alleged was under proceedings, the latter, being in possession, instituted a suit against the relator and R. C. Brooks et al. to quiet his title to the premises, and that the said Edmond Brooks was, on the 25th of June, 1865, adjudged to be the owner thereof in fee. The relator admits the recovery of this judgment, but seeks to avoid it by a replication alleging that the relator appealed from the judgment to the supreme court where the case is now pending. There are matters alleged in the answer and in the replication other than those we have adverted to, but none having any bearing upon the merits of this application. The case has been submitted upon the pleadings.

The right of the relator to a mandamus is not put, in the complaint, upon the ground that Edmond Brooks entered upon the premises under or by leave and license of R. C. Brooks and others, pending the action of ejectment brought by the relator against them, but upon the ground that having forcibly ousted the parties under a title paramount, Edmond Brooks assumed the defense of the action and thereby made himself a party to it in legal effect. The judgment against Calderwood, relied upon in the answer, was rendered some eighteen months subsequent to that recovered by him in the ejectment suit, and acts as directly upon the question of title and right of possession as the judgment by which it was preceded. The two judgments are not in conflict with each other, however, for the suit to quiet title was not only tried and determined but was brought after the commencement of the ejectment. The judgment in the suit to quiet title, standing by itself, may be regarded as a good defense to this petition, but its present effect is suspended or avoided by the appeal alleged in the replication, assuming an appeal to have been taken: Woodbury v. Bowman, 13 Cal. 635. The burden of proving the appeal, however, as a fact in the case, was clearly upon the relator and in the absence of all evidence bearing upon that question, the petition must be denied.

And it is so ordered.

We concur: Currey, C. J.; Sawyer, J.; Rhodes, J.

PEOPLE ex rel. BOARD OF STATE HARBOR COMMISSIONERS, Respondents, v. THE CENTRAL WHARF JOINT STOCK COMPANY OF SAN FRANCISCO, Appellants.

No. 800; October 8, 1866.

**The So-called "Legislative Assembly of the District of San Francisco" and the ayuntamiento of San Francisco had no valid powers whereby the former could make a grant and the latter confirm it.**

APPEAL from Fourth Judicial District, San Francisco County.

This suit was brought to have the defendants enjoined perpetually from collecting tolls, wharfage, anchorage, dockage or other duty out of or connected with the Commercial street wharf and waterfront in the city of San Francisco, and to have it decreed that the plaintiffs have the right thereto and the possession, also to have a receiver appointed; also for an accounting and for damages. The facts were these: On the 3d of May, 1849, the legislative assembly of the district of San Francisco passed an act entitled, "An act to incorporate the Central Wharf Joint Stock Company of San Francisco, Cal.," assuming the power to "ordain, constitute and appoint" all such persons as were then or thereafter might become members, etc., to be a body corporate and politic, in fact and in name, "for the purpose of building and keeping in repair a wharf, to run from some point in Montgomery street, between Clay and Sacramento streets, to the ship channel in front of said town." By section 10 of the act there was demised to the company, its successors and assigns, during the continuance of the act, "all that portion of the beach and water lots" included within those streets and the ship channel, provided that the lots should be appropriated to no other purpose than "basins for the reception of vessels," etc. On the 5th of the same month Leavenworth, alcalde, granted to Rodman M. Price, for the benefit of the company, the entire block of water lots "bounded by Clay street, Battery street, Sacramento and Front streets containing one hundred varas square," which block Price thereupon conveyed to the com-

pany during the same month. The next winter, in response to a petition by Price to the "town council," a committee of that body recommended that the ayuntamiento confirm the grant made, as above, by the legislative assembly. This was done as recommended. Under these ordinances, and without any other authority, the company constructed their wharves, and subsequently, as the city advanced, indifferent to the proviso, filled up many of the water lots and built warehouses on them, besides pushing wharves at angles that took them beyond the limits of the grant.

It was contended by the plaintiff, among other things, that the pretended act of incorporation was a nullity and gave no rights to the defendants—that the confirmation by the ayuntamiento gave no validity to the pretended charter, but was itself wholly without authority and void. The court below so found and gave judgment accordingly.

E. Tompkins for respondents; J. B. Felton for appellants.

SANDERSON, J.—That the so-called "legislative assembly of the district of San Francisco" and the ayuntamiento of San Francisco did not possess the power which they exercised, or attempted to exercise in this case, is too obvious for argument. The first was an illegal and unauthorized body and their assumption of legislative functions a usurpation. The confirmation by the ayuntamiento imparted no validity to the previous grant of the "legislative assembly of the district of San Francisco" for the reason that that body did not itself possess the power to make such a grant and could not therefore confirm and make valid a previous void grant.

Judgment affirmed.

We concur: Shafter, J.; Rhodes, J.; Currey, C. J.; Sawyer, J.

## PEOPLE, Respondent, v. HENRY W. SEALE et al., Appellants.

No. 1122; December 17, 1866.

**Default Judgment.—In Refusing to Open a Default Judgment,** taken only after several months have passed since the lapse of the statutory time for answering, the court will be deemed not to have overstepped the bounds of sound discretion.

APPEAL from Third Judicial District, Santa Clara County.

D. W. Herrington for respondent; S. O. Houghton for appellants.

SAWYER, J.—This is an action to recover a tax levied for the erection of a schoolhouse under the act of April 6, 1863 (Laws 1863, p. 194, sec. 37; Hitt., par. 6702), which provides that, if not paid within the time prescribed, the tax "shall be recovered by suit in the same manner and with the same costs as delinquent state and county taxes." The mode in which state and county taxes are to be collected is prescribed by the act of 1861 (Laws 1861, pp. 432–434, sec. 39 et seq.). We think the complaint sufficient under these provisions of the statute. We cannot perceive that the district court overstepped the bounds of a sound discretion in refusing to open the default, and allow defendant to answer. Several months elapsed after the time allowed to answer expired, before the default was entered. If the defendant was unable to procure the information necessary to prepare an answer, he could, undoubtedly, upon a proper showing, have procured an extension of time. No considerable diligence appears to have been manifested: Bailey v. Taaffe, 29 Cal. 422.

The judgment must be affirmed, and it is so ordered.

We concur: Sanderson, J.; Currey, C. J.; Shafter, J.

ISBELL, Appellant, v. OWENS, Respondent.

No. 993; December 17, 1866.

**Contract to Pay Money—Certainty—Defeasance Clause—Construction.**—Under a contract whereby a certain sum is to be paid on a named day absolutely, another similar sum on a contingency and more thereafter, to make up in all a sum total promised to be paid, which contract, however, provides that "if the claim should fail to pay after testing the contract is to be null and void," nothing at all is due from the promisor after such failure is developed.

APPEAL from Fifth Judicial District, San Joaquin County.

The case arose out of this instrument which was signed by both parties: "This is to certify that I have this day sold and conveyed to B. W. Owens three-sixths or one-half of a certain quartz lode, known as the Isbell claim, and located near the town of Vallecito, in Calaveras county, for the sum of three thousand dollars, the payments to be made as follows, viz.: two hundred and fifty dollars when the claim is pumped out, and the prospect showed to be satisfactory as represented by me, also the further sum of two thousand five hundred dollars, to be paid when that amount is realized out of said claim, or the one-half of said claim, over and above all the outlay of money and expenditures made by the said B. W. Owens on said claim, and it is further agreed and understood, that if it becomes necessary to add machinery for crushing, then the sum of twelve hundred and fifty dollars to be paid on said contract, and twelve hundred and fifty dollars after the said machinery is paid for, and when taken out of said claim, and to be paid in equal dividends in proportion to the number of shares. It is further understood, that if the said claim should fail after testing then this contract to be null and void."

The answer was in part thus: "Defendant denies that he ever erected or deemed it necessary to erect machinery upon the claim mentioned in the complaint, and denies that there is any machinery erected upon said claim by the consent or procurement of defendant. Defendant further answering avers that after said claim had been thoroughly tested by defendant it was found that the said claim was of no value, and

that the same would not pay the expenses of working, and the same has been abandoned by the defendant." Such other facts as are essential appear in the court's opinion following.

Budd & Carr for appellant; Tyler & Cobb for respondent.

SHAFTER, J.—The complaint admits the payment of the first two hundred and fifty dollars at the agreed date, and the payment of the second two hundred and fifty dollars at the "pumping out of the claim"; and seeks a recovery of the sum of twelve hundred and fifty dollars first mentioned in the agreement, on an averment that "the defendant, deeming it necessary, caused machinery to be erected and added for the crushing of quartz taken from said lode." The question presented is whether the liability of the defendant to pay the twelve hundred and fifty dollars sued for is made by the contract to depend upon the erection of machinery to the exclusion of every other condition. The question may be treated as arising upon demurrer or motion in arrest.

The contract lacks precision and some of its provisions seem at first blush to be contradictory. For instance: the first two hundred and fifty dollars is made payable absolutely on a day named, and the second two hundred and fifty dollars absolutely on the happening of a certain event; and still the last clause of the instrument provides that "if the claim should fail to pay after testing that the contract is to be null and void." Still these apparently conflicting provisions may be reconciled when all the terms of the contract are viewed in relation. The liability to pay the first two hundred and fifty dollars was intended to be absolute—maturing by the mere lapse of time; and the liability to pay the second two hundred and fifty dollars was also made absolute by intention on the happening of the event specified; and the last clause providing that the contract should go for naught in the event that the claim should fail to pay after testing, was intended to be limited to the two thousand five hundred dollars—for the liability to pay that sum is made by a preceding clause to depend upon how the mine should stand testing. If it could be worked at a profit, then when the profits amounted to two thousand five hundred dollars, that sum was to be paid to the plaintiff, but if the claim should fail to pay after testing, or fail to pay

to that extent, then the contract, in so far as the two thousand five hundred dollars was concerned, was to be null and void. The two sums of twelve hundred and fifty dollars each, named in the contract, are not cumulative to the two thousand five hundred dollars but the same sum stated by moieties. This is shown by the fact that the sale was for three thousand dollars—and not for four thousand five hundred dollars. The question is narrowed to this: The payment of the two thousand five hundred dollars is made to depend, in the first instance, upon a successful testing of the mine, and a realization of that amount from it over and above all expenses—the payment to be made in solido. Did the parties, after having thus guarded the interests of the defendant, intend to disconnect his liability from these favorable conditions, and make it to depend altogether upon whether the defendant should work the mine with machinery or without it? We think not. Our construction based upon the language, and upon the scope and sense of the thing as gathered from it, is that the liability to pay the two thousand five hundred dollars, or any part of it, was intended to turn upon the results of the experiment wholly irrespective of the character of the instruments used in making it. Should the mine be successfully tested without machinery, then the two thousand five hundred dollars was to be paid in one payment, "when that amount should have been realized out of the said claim, or the one-half of said claim, over and above all outlay of money and expenditure by the said B. W. Owens on said claim." On the other hand, should the defendant test the mine by the use of machinery, then on the happening of the same contingency the money was to be paid in a different manner, that is, in installments of twelve hundred and fifty dollars each—the first when two thousand five hundred dollars surplus should have been realized; the second, when, the machinery having been paid for, twelve hundred and fifty dollars should thereafter have been "taken out of said claim." This construction gives effect to the clause by which the defendant's liability to pay the two thousand five hundred dollars is made to depend absolutely upon the profitableness of the claim, and to that clause also which provides that if unprofitable the contract shall be null and void; and to the clause respecting the use of machinery; for its use determines that the amount stipulated is to be paid not in

gross but by installments. Under this construction of the contract the defendant was entitled to judgment on the face of the complaint, for it stated no breach of the contract declared on.

Taking the question upon the findings however, they fully support the judgment. And if the decision be considered in connection with the evidence, there is nothing in that tending to prove that the defendant ever realized anything from the claim over and above his outgoes, though there is some tending to prove that the mine was not or may not have been altogether valueless.

It is urged that there was evidence to the effect that the defendant had never tested the mine but had sold and conveyed it to a company of which he was a member and trustee, and that he should therefore be held liable for the twelve hundred and fifty dollars. One answer to the objection is, that the cause of action stated in the complaint is not put upon that, but upon a very different ground. Whether there are any other answers to the objection it is not necessary to consider.

Judgment affirmed.

We concur: Sawyer, J.; Rhodes, J.; Currey, C. J.; Sanderson, J.

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TIERY WRIGHT, Appellant, v. THOMAS TREGANZA, Respondent.

No. 1020; December 17, 1866.

**Appeal—Judgment-roll—Statement.**—An appeal brought up on a judgment-roll does not need a statement to be annexed to the judgment-roll.

**Evidence.—An Answer Setting Up a Parol Modification** of the written contract sued upon is good if the modification is alleged in it as having been made subsequently to the making of the contract.

APPEAL from Sixth Judicial District, Sacramento County.

H. H. Hartley for appellant; F. F. Taylor for respondent.

SHAFTER, J.—Appeal from judgment and order denying motion for new trial. As to the appeal from the judgment, there is no statement annexed to the roll, and we find no error in that. The parol agreement set up in the special answer as a modification of the written one is not averred to have been made at the same time the written was entered into, but thereafter, and the defense was therefore valid in law. All the facts essential to the special defense are contained in the findings.

Judgment and order denying new trial affirmed.

We concur: Sawyer, J.; Sanderson, J.; Currey, C. J.; Rhodes, J.

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## PEOPLE, Respondent, v. HOAG, Appellant.

No. 1122; December 17, 1866.

**Appeal—Modification of Judgment.**—On appeal from a judgment correct in respect to the findings in all except the amount due, which amount also is in excess of the demand in the complaint, the judgment is to be modified so as to accord with the demand as proved, and allowed to stand as modified.

APPEAL from the Third Judicial District, Santa Clara County.

D. W. Herrington for respondent; S. O. Houghton for appellant.

SAWYER, J.—This case was submitted in connection with People v. Seale and People v. Chan. The leading facts are similar, and the judgment might have been affirmed but for the fact that a mistake has occurred in entering the judgment, by which a much larger sum has been recovered than was demanded in the complaint or found due by the court. The complaint alleges and the court finds the amount of the tax assessed to be seventy-three dollars and one cent, while the judgment rendered is for three hundred and thirty-eight dollars and sixty-two cents and costs of suit. This is clearly an error, but the record furnishes the data for correcting it.

Ordered that the judgment be so modified as to reduce the sum of three hundred and thirty-eight dollars and sixty-two cents to seventy-three dollars and one cent, and that the judgment so modified stand as the judgment of the court.

We concur: Sanderson, J.; Currey, C. J.; Rhodes, J.; Shafter, J.

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## WESTERN PACIFIC RAILROAD CO., Appellant, v. E. P. REED et al., Respondents.

No. 1031; December 17, 1866.

**Eminent Domain—Setting Aside Report—New Trial.**—In an act giving the right to parties to condemnation proceedings, dissatisfied with the report, to move for a setting aside of the latter and for a new trial "upon good cause shown," the word "good" is to be understood as meaning sufficient.

**Eminent Domain.—On a Motion for Setting Aside the Report** of commissioners under an act for condemnation, which act, or the order of court thereunder, contains no requirement that the evidence be reported, it is not sufficient for the statement to embody the minutes of the testimony which the commissioners happen to have taken and filed with their report.

**Appeal—Service of Notice.—The Rule** of the Supreme Court that "transcripts used on appeal must show that a notice of appeal has been duly served upon the other side" does not justify a respondent in raising the point of service after the appeal has been taken, for the first time then denying the fact, when the certificate of the clerk to the transcript establishes the existence of the original document on file in his office and the record shows the acknowledgment of service with the name of the respondent affixed.

APPEAL from Third Judicial District, Santa Clara County.

S. O. Houghton for appellant; R. F. Peckham for respondents.

SHAFTER, J.—This is an appeal from a judgment rendered in a proceeding to condemn the lands of the respondents to the public use and from an order denying the appellant's motion for a new trial. The ground of the motion

was the alleged insufficiency of the evidence to justify the damages as assessed and awarded by the commissioners. The respondents insist that the plaintiffs have no right to be heard upon the appeal from the order, for the reason that the motion was not supported by a statement of the evidence in the court below, and they move that the appeal from the order be dismissed.

The thirty-first section of the act of 1861 (Acts 1861, p. 621) is as follows: "The said company, or any of said defendants if dissatisfied with the report, may within twenty days after the time for filing said report, and after ten days' notice to the parties interested, move to set aside the report and to have a new trial as to any tract of land; and upon good cause shown therefor, the said court or judge shall set aside the report as to said tract of land, and may recommit the matter to the same or to other commissioners." The act gives no clue to the causes or grounds upon which a new trial may be awarded, except such as may be suggested by the word "good," and that, in itself considered, is measurably, if not altogether, valueless for the purposes of definition. But we are not confined to the inherent force of the term, for the use of it clearly involves a reference to those matters which the law had previously distinguished as good; that is, sufficient grounds for new trials at large. It is also true that the act does not expressly point out the mode in which the grounds of the new trial asked for are to be brought to the notice of the court. It simply requires that the cause or causes shall be "shown."

But how is the showing to be made? It cannot be said that it is to be made according to the course of the common law, for there was no such thing as a new trial at common law—or at least none based upon matters dehors the record; and it follows that the legislature must have intended that the grounds in question should be shown to the court through the method established by the general legislation on the subject of new trials. The commissioners in this case filed their minutes of the testimony taken at the hearing, and this report of the evidence has been copied into the transcript. They were not required by the act to report the testimony, nor by the order of court under which they acted, and the evidence could be made available to the plaintiffs for the purposes of

their motion in the court below only by embodying it in a settled statement.

It is objected by the respondent Stevenson to the appeal from the judgment, in so far as he is related to it, that the transcript does not show that notice of the appeal was served upon him. There is a notice of appeal in the record, with an acknowledgment of service indorsed thereon to which the name of Stevenson is affixed. This is enough. The certificate of the clerk to the transcript establishes the existence of the original document on file in his office, and the authenticity of the document is, for all the purposes of this proceeding in error, established by the fact that it is there. The rule laid down in Franklin v. Reiner, 8 Cal. 340, and in Hildreth v. Gwindon, 10 Cal. 491, that "transcripts used on appeal must show that a notice of appeal has been duly served upon the other side," means nothing more than that the truth of everything contained in the transcript being assumed, the fact of services should be set forth either by direct statement, or alternatively by the mode adopted in this instance. The case of Alderson v. Bell et ux., 9 Cal. 315, instead of being opposed to this view, sustains it.

The motion to dismiss the appeal from the order is granted, and the motion of Stevenson to dismiss the appeal from the judgment is denied.

We concur: Sawyer, J.; Currey, C. J.; Rhodes, J.; Sanderson, J.

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## ROBINSON, Appellant, v. VAIL et al., Respondents.

No. 999; December 17, 1866.

**Husband and Wife.—In the Trial of an Action to Set Aside a Deed by plaintiff to a married woman on the ground that a mortgage and note for an unpaid balance of the purchase money was not joined in by the husband, and that at the time of the sale both husband and wife had represented that she was a sole trader with full power to contract in her individual name, the plaintiff rests prematurely if proving only thus far, not proving a repudiation of the instruments by the maker or a claim by either her or her husband that she was not a sole trader.**

APPEAL from Second Judicial District, Tehama County.

R. T. Sprague and Cope, Dangerfield & Hambleton for appellant; W. Earll and E. Garke for respondents.

SHAFTER, J.—This is an action to set aside and annul a deed executed by the plaintiff to E. M. C. Vail, wife of G. C. S. Vail, of an undivided half of certain hotel property situate in the county of Shasta. The relief was asked for on the ground of fraud, and on the ground also that the deed was void for want of consideration. The defendants answered separately, each denying all the allegations of the complaint. The case was tried by the court and the plaintiff was nonsuited. One of the grounds of nonsuit given in the written opinion of the court is that there was no evidence tending to prove the fraud alleged in the complaint. The appeal is from the judgment.

The testimony of the plaintiff tended to prove that G. C. S. Vail and E. M. C. Vail were husband and wife, and that on the 30th of June, 1860, the plaintiff and Mrs. Vail entered into a written contract whereby he bound himself to convey to her his interest in the hotel and furniture for the sum of ten thousand dollars, payment to be made in part by a transfer of certain cattle belonging to Mrs. Vail, and the balance of the purchase money was to be secured by her promissory notes secured by mortgage on the property. The evidence further tended to prove that both Vail and his wife represented to the plaintiff "that she was a sole trader, and was fully authorized and competent to make and enter into contracts in her individual name"; and "that these representations could not have been made stronger than they made them." The evidence further tended to show that the plaintiff entered into the contract of sale believing these representations to be true, and in consequence of this belief. It further appeared that the plaintiff executed a deed and bill of sale to Mrs. Vail on the 1st of October, 1860, in pursuance of the contract, and that she at the same time delivered cattle to the plaintiff of the agreed value of two thousand four hundred and ninety-eight dollars, and executed her note to him for seven thousand five hundred and two dollars—balance of purchase money—secured by her mortgage on the estate purchased. Neither the note

nor mortgage was signed by the husband, and the acknowledgment of the wife to the mortgage was that of a person sui juris. There was no evidence, however, that Mrs. Vail was not a sole trader in fact, nor was there any that she had repudiated the notes or the mortgage given to secure them. The attention of the appellant's counsel was called to this failure of proof in the brief filed for the respondents, but the brief in reply contains no allusion to the matter, and on looking diligently through the record we can find no evidence contravening Mrs. Vail's assertion made at the date of the sale that she was a sole trader and fully authorized as such to make contracts in her own name. It is obvious that the plaintiff rested his case prematurely at the trial.

The other errors complained of, should they be admitted to be such, could not have prejudiced the plaintiff, for they are all foreign to the ground upon which the judgment of nonsuit was rendered and could in no manner have contributed to it.

Judgment affirmed.

We concur: Sawyer, J.; Sanderson, J.; Rhodes, J.; Currey, C. J.

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SPANGEL, Respondent, v. DELLINGER, Appellant.

No. 968; December 17, 1866.

**New Trial.—A Motion to Strike the Statement, on motion for a new trial, from the transcript as not having been filed within the statutory time after notice to the appellant of the decision of the judge, should be sustained.**

SHAFTER, J.—The plaintiff moves to strike the statement on motion for new trial from the transcript, on the ground that the statement was not filed within the statute time after the defendant received notice of the decision of the judge. The objection is well taken. The court had no power to amend the record after the lapse of the term. That point was decided in De Castro v. Richardson, 25 Cal. 52.

No notice of motion to strike out was necessary under the thirteenth rule of this court. The defect was one that ad-

mitted of no remedy, and notice would therefore have been useless.

The appeal from the judgment has been dismissed already, and with the statement on motion for new trial stricken out, the plaintiff will be left without a case.

Motion to strike out statement on new trial granted, and judgment affirmed.

We concur: Rhodes, J.; Sanderson, J.; Sawyer, J.

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M. R. MILLER, Respondent, v. D. F. BEVERIDGE et al., Appellants.

No. 1062; December 17, 1866.

**Appeal—Order on Motion for New Trial.**—On appeal the court will not consider a motion for a new trial as if denied, when no order to that effect was made, but rather one refusing the applicant leave to file a statement out of time and then dismissing the motion for lack of prosecution.

APPEAL from Seventh Judicial District, Solano County.

W. S. Wells and L. C. Hays for respondent; G. W. McMarty and J. Huckins for appellants.

SANDERSON, J.—This purports to be an appeal from the judgment and an order denying a motion for a new trial; but upon inspection of the record it appears that no such order was ever made. The only order ever made by the court after judgment, as counsel for appellants admit, was an order refusing them permission to file a statement on motion for a new trial after the time allowed for that purpose had expired and dismissing their motion for a new trial for the want of prosecution. From this order no appeal is taken, but the order is merely assigned as error upon the appeal from the judgment and an order denying a new trial which has no existence. Moreover, the transcript contains no statement upon appeal either agreed to by counsel or settled and certi-

fied as correct by the judge. It is true that there is an affidavit in the transcript upon which counsel say their motion was made; but it is not identified as such by the indorsement of the judge or clerk, without which it cannot be noticed by us. Counsel have therefore wholly failed to furnish us a record upon which we can reach the only error which they have assigned.

But we will add, for the satisfaction of counsel, that there would be nothing in their case upon their own showing if they had one here. The judgment was rendered on the 19th of January, 1866. The motion was made at the next term of the court in May, 1866. It was equivalent to a motion for an extension of time within which to file a statement on motion for new trial. Now, in no event can the court or judge extend the time two months and more. Even where the motion for an extension is regularly made before the expiration of the time allowed by the statute, he cannot extend it beyond twenty days: Practice Act, sec. 195, and Harper v. Minor, 27 Cal. 114.

Judgment affirmed.

We concur: Sawyer J.; Rhodes, J.; Currey, C. J.; Shafter, J.

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ELIAS, Appellant, v. VERDUGO et al., Respondents.

No. 967; December 17, 1866.

**Appeal.—When There is Little Conflict in Evidence,** the supreme court is disposed to reverse the trial court if the findings seem to be upon insufficient evidence.

APPEAL from First Judicial District, Los Angeles County.

Jas. H. Lander for appellant; V. E. Howard for respondents.

See Elias v. Verdugo, 27 Cal. 418.

SHAFTER, J.—This is an action to foreclose a mortgage executed by the defendant, Julio Verdugo on the 6th of December, 1860, to secure his promissory note to the plaintiff

of that date. The property covered by the mortgage is known as the "Rancho San Rafael," situate in the county of Los Angeles, and came to Verdugo and his sister Catalina by descent, on the death of their father in 1832. It was claimed by the plaintiff at the trial that Julio and Catalina continued to own the property as tenants in common at the date of the mortgage, and therefore that the lien imposed by it was upon one-half of the estate undivided. It was claimed by the defendants, however, that there was a parol partition of the rancho in 1832, whereby the south half was set off to Julio Verdugo and the north half to Catalina, and that the occupation of the respective portions had ever since conformed to the division so made. A homestead right in the southern half was also set up by the defendants in opposition to the mortgage. The case was tried by the court and the findings on both points were in favor of the defendants.

It may be admitted for the purposes of argument, and it could not be admitted without hesitation for any other, that the findings, in so far as the agreement to divide is concerned, are free from objection; still we are satisfied on careful examination of the record that the testimony was wholly insufficient to justify the finding that the land was occupied thereafter in conformity to the agreement: Long v. Dollarhide, 24 Cal. 218. There is very little conflict in the evidence on this point, and we consider the demonstration that the occupation was joint and not several from 1832 to 1861, when there was a formal partition by deed so far complete as to justify a reversal under the decisions applicable to the question.

But should the agreement to divide and a several occupation in pursuance of it both be admitted, still there was no evidence tending to prove a homestead right in the defendants in the southern half under the act of 1851. In so far as the testimony related "to the dwelling place of the family—where they permanently resided" (Cook v. Christian, 4 Cal. 26; Taylor v. Hargous, 4 Cal. 272, 60 Am. Dec. 606), at the date of the mortgage, it pointed unmistakably to the old ranch house on the north half of the estate.

Judgment reversed and new trial ordered.

We concur: Sanderson, J.; Sawyer, J.; Currey, C. J.; Rhodes, J.

MARTIN, Appellant, v. ZELLERBACH et al., Respondents.

No. 936; December 20, 1866.

**Corporation.—A Corporation may Ratify a Contract Made by Persons** who, without authority, have assumed to represent it, and its power is, in that particular, coextensive with that of a natural person, unless by the charter the power is taken away or restricted to some particular formulary or mode.

**Corporation.—A Ratification Need not in All Cases be Expressed**; it may be implied, and the implication, which usually is based on conduct, may consist of acts or of omissions to act, or of both.

**Corporation—Ratification of Contract—Creditors.**—After an unauthorized act of a corporation, in contracting to convey, has been ratified by the stockholders, a creditor, who has become such after the ratification, may not claim that the contract was fraudulent and void as to creditors, and hence not enforceable, unless he proves that the ratification was had with a fraudulent intent; he cannot put upon the defendant the burden of proving the honesty of the ratification.

**Corporation—Ratification of Contract—Evidence.**—A plaintiff, whose contention rests on an act of a corporation alleged by him to be unauthorized, may rebut evidence put in to sustain the defense of ratification by proof that the ratification was with fraudulent intent, and may do so without first replying specially to the defense in the pleadings.

APPEAL from Fifteenth Judicial District, Nevada County.

Caldwell & Hubert for appellant; Belden & Niles for respondents.

SHAFTER, J.—Ejectment to recover the possession of certain ditch property situate in the county of Nevada. The defendants set up an equitable title to the ditch older than the legal title of the plaintiff, both titles being derived from the Eureka Lake Company, as a common source. The trial was by the court, and the judgment was in favor of the defendants. The appeal is from the judgment and from an order overruling the plaintiff's motion for a new trial. The appeal from the order is of no avail, for the evidence is not set forth in the statement, and the exceptions relied on are so imperfectly "explained" therein (Practice Act, sec. 190) that we cannot say that the rulings to which they relate are erroneous; and

the same remark is applicable to the appeal from the judgment in so far as it is based upon those exceptions. The result is that the only question before us is as to the law of the facts found, or agreed, and now relied on by the defendants as the basis of the equitable title asserted by them. This state of the record relieves us from the necessity of considering many of the questions discussed in the briefs of counsel.

The facts of the defendants' equity, as found by the court, are as follows: In 1859, and for several years before that time, the Eureka Lake Company was the owner and in possession of the ditch in controversy. At the same time another corporation, duly organized, called the "Miner's Ditch Company," owned certain other ditches in Nevada county. In the spring of 1859 a meeting of the stockholders of the Eureka Lake Company was held at Moore's Flat, their usual place of business, for the purpose of considering the project of uniting the property and business of the two corporations. All the stockholders were notified of the meeting and all the stock was represented, and it was agreed and determined by the stockholders, unanimously, that they would unite with the Miner's Ditch Company, on condition that the property of the two corporations should be thrown together and managed in common, and should be owned in the proportion of two shares to the Miner's Ditch and three shares to the Eureka Lake; and the president was authorized to communicate this overture to the Miner's Ditch Company. In May, 1859, there was a meeting of the Miner's Ditch Company, held for the express purpose of acting upon this proposition, at which meeting all the stock was represented, and the proposition was accepted by a formal vote.

In accordance with this agreement the two companies commenced acting in common and as one body on the 29th of June, 1859, and from that time until the fall of 1860 the property of both corporations was managed by common agents who had full possession and control of it all. Business was done in the joint names of the two companies. During this time large amounts of money were expended in improving the common property—over thirty-five thousand dollars on ditches of the Eureka Lake Company alone. This arrangement was only temporary, the intention being to effect finally a complete and legal union of the property and business of the two cor-

porations. Accordingly, a meeting of the stockholders of the Eureka Lake Company was regularly called and held in September, 1860, for the purpose of acting upon a proposal to create a new corporation, to be composed of the members of the two old ones, to which new corporation the property of both the old ones should be conveyed; and at said meeting it was determined that such new corporation should be organized and that the Eureka Lake Company would convey to it all its ditches and property upon the consideration that the Miner's Ditch Company would do the same, and that stock in the new corporation would be credited to the stockholders of the two companies in the proportion agreed upon. Similar action was taken by the stockholders of the Miner's Ditch Company at a meeting regularly called and held about the same time. Immediately afterward, in the month of October, 1860, in accordance with these arrangements, a new corporation, called the Eureka Lake Water Company, was duly organized by the stockholders of the Eureka Lake Company and the Miner's Ditch Company, and the latter company, on the 29th of October, 1860, conveyed all its part of the property to the new corporation.

About this time the members of the Eureka Lake Company were informed by counsel that their corporation had never been perfected; that there was no such corporation as the Eureka Lake Company in existence, and that the only way in which they could convey the property was by a deed signed by each member of the company in his individual capacity; and in accordance with that advice a deed signed by the individual stockholders of the Eureka Lake Company was executed October 25, 1860, purporting to convey all the said property of the Eureka Lake Company to the Eureka Lake Water Company, and from that time, viz., October 25, 1860, to January, 1863, the new company had complete possession and control of the property, claiming it as its own, no one interfering with or disputing its title or possession, but no deed of conveyance was ever given to the Eureka Lake Water Company by the Eureka Lake Company as a corporation.

Immediately after the formation of the Eureka Lake Water Company stock-books of that corporation were opened and stock was issued to all the stockholders of the two old companies in the proportions agreed upon. After the new com-

pany received possession it expended large sums in improving the property. It borrowed of defendants two hundred thousand dollars, a large portion of which was used in paying off liens on the property of the Eureka Lake Company, contracted before the Eureka Lake Water Company was organized. To secure this money so borrowed from the defendants the Eureka Lake Water Company gave to them a mortgage upon all the property, which mortgage provided that said defendants might receive and apply the profits and income of the property to the satisfaction of the said mortgage debt; and to more fully carry out this agreement, the Eureka Lake Water Company, on the 3d of July, 1863, gave to the defendants full possession and control of the property, and the defendants were in possession under this mortgage and agreement at the time of the alleged ouster as set forth in the complaint.

The general question is, whether these facts show a contract on the part of the Eureka Lake Company, as a corporation, to convey its ditch and water rights to the Eureka Lake Water Company, in consideration that the Miner's Ditch Company would make a like conveyance of its property to the same grantee; the new company being the instrument or agency through which the common purpose was to be carried into effect.

It may be admitted, for the purposes of argument, that the votes passed at the meetings of the stockholders of the Eureka Lake Company and the related votes of the stockholders of the Miner's Ditch Company were absolute nullities—the power of making contracts binding upon the corporations, respectively, being vested in the respective boards of trustees by the act under which the corporations were organized—leaving the question of whether the contract attempted to be made by the two sets of stockholders was or was not subsequently ratified by the respective corporations as the principal matter or point to be decided.

That a corporation may ratify a contract made by persons assuming to represent it without authority, and that its power is in that particular coextensive with that of natural persons, unless taken away by charter, or restricted by it to some particular formulary or mode, is admitted by both parties. That this power was exercised by the Miner's Ditch Company, at

least, is put beyond dispute by the finding that "the Miner's Ditch Company, on the 29th of October, 1860, conveyed all its part of the property to this new corporation—the Eureka Lake Water Company"; and we consider it to be equally clear that the Eureka Lake Company, though it never executed the contract made by its stockholders by giving a corporate deed, still ratified it in effect, and thereby made the contract its own.

A ratification may be either express or implied, and in the latter event the implication is usually, if not always, based upon conduct. The conduct may consist either in acts or in omissions to act, or it may lie in both. The facts found in the case at bar show a ratification in both forms by the Eureka Lake Company of the action of its stockholders.

It appears that the "arrangement" first attempted by the stockholders was a "temporary one—the intention being to effect finally a complete and legal union of the property and business of the two corporations." It is further found that "in accordance with this agreement the companies commenced acting together in common as one body, and on the 29th of June, 1859, the property of both corporations was managed by common agents who had the full possession and control of all. Business was done in the name of the Eureka Lake and Miner's Ditch Company. During this time large amounts of money were expended in improving the common property—over thirty-five thousand dollars being expended on the ditches of the Eureka Lake Company alone." It will be observed that the acts here enumerated were not, according to the findings, the acts of the stockholders, but of the companies, and, in the matter of quality, they were the very acts which the agreement of the stockholders contemplated or called for; and it is found in terms that these acts were performed by the respective companies, not outside of or irrespective of that agreement, but "in accordance with it."

The agreement "to unite the business and property" of the two companies—not their powers and franchises—was clearly a finality in the understanding of the respective stockholders, and the Eureka Lake Company, by voluntarily fulfilling its provisions in co-operation with the Miner's Ditch Company, must, in the absence of any finding to the contrary, be presumed to have ratified the contract as it was made or projected by the stockholders. The "arrangement" was "temporary"

only in this: it did not fully consummate on the instant the general purpose "to unite the property and business of the two companies"—such "complete and legal union" was postponed to a future day. At the second meeting of the stockholders held in September, 1860, the device of a new corporation to be called the Eureka Lake Water Company was hit upon as a means through which the "complete and legal union" to which the Eureka Lake Company was already committed might be consummated. After the creation of the new corporation the Eureka Lake Company recognized it in the relation or office to which it had been thus informally appointed; for it appears that the company took the property out of the possession of the "common agents" to whom it had been committed de bene esse, and "gave to the new company full possession of all the property in October, 1860; and that that company had the full possession and control of it to January, 1863, claiming it as its own, no one interfering with or disputing its title or possession. . . . . After the Eureka Lake Water Company received possession, it expended large sums of money in improving the property and in paying off liens contracted before that time by the Eureka Lake Company." From these facts, taken in connection, it is apparent that the Eureka Lake Company, in the first place, ratified the general arrangement made in 1859 by its stockholders with the stockholders of the Miner's Ditch Company for a union of the property and business of the two companies; and, in the second place, that it adopted and used the new company subsequently created as an instrument to accomplish that result. Under such circumstances, neither the Eureka Lake Company nor anyone standing in its shoes can be heard to say that it never brought itself into corporate relations with the contract made in its name and for its advantage by its stockholders. A decision to the contrary could be put upon no intelligible principle, nor could it, as we understand the cases, be vindicated on the ground of authority: Proprietors of the Canal Bridge v. Gordon, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; Dunn v. St. Andrews Church, 14 Johns. (N. Y.) 118. The case cited from the 1st of Pick. was like the present in every substantial particular.

Second. It is further insisted on the part of the appellants, if the contract to convey is to be regarded as the contract of the company, that it cannot be enforced, for the reason that it was fraudulent and void as to creditors.

The point cannot be maintained for want of facts. The court has not only not found the facts essential to the charge, but has found two, at least, out of agreement, if not incompatible, with its truth, viz., that the plaintiff was not a creditor at the date of the ratification of the contract by the Eureka Lake Company, and that large sums of money were raised and applied by the new company in payment of debts of the old one. It is a mistake to suppose that it devolved on the defendants to prove, as a part of their own case, that the contract was not ratified by the Eureka Lake Company for the purpose of defrauding its creditors. The burden of proving that it was so ratified was unquestionably upon the plaintiff. Nor, if he had the evidence at command, could he have been embarrassed in using it at the trial on the ground that he was excused under our system from the necessity of specially replying the fraud on the record. He was at full liberty to make the reply ore tenus at the bar, and that instead of being an embarrassment, was in the nature, at least, of a positive advantage.

Third. It is further claimed for the appellant that the contract to convey, treating it as the contract of the Eureka Lake Company, was null and void, for the reason that the company had neither the right nor the power to sell all of its ditches and water rights.

Corporations aggregate have at common law an incidental right to alien or dispose of their lands and chattels, unless specially restrained by their charters or by statute (4 Co. Litt. 44a, 300c; 1 Sid. 161, note at the end of case; 1 Kyd, 108; Reynolds v. Commissioners etc., 5 Ham. 166; 2 Kent's Com. 108), and though a corporation alien all its goods and possessions, yet the corporation continues: 1 Com. Dig., tit. "Franchise." By the fourth section of the act under which the Eureka Lake Company was organized, it was authorized "to purchase, hold, sell and convey such real and personal estate as the purposes of the corporation should require." It will be observed that no distinction is taken between real and personal estate, and that the jus disponendi as related to both

is coextensive with the "purposes" of the corporation. It is apparent that the validity of the contract to convey, ratified by the Eureka Lake Company, cannot be dealt with by the court as a pure question of law. The act of sale was not unlawful in itself, and whether the sale in the given instance transcended the limit put upon the power by the act is a question of fact upon which, if raised at the trial, the court must be presumed to have passed adversely to the plaintiff, inasmuch as no exception appears to have been taken to the findings under the act of 1861: Acts 1861, p. 589, sec. 2.

Further, it may well be questioned whether it is competent for the plaintiff to raise the objection. The point of the objection is, that the corporation was guilty of a misuser of its franchise by overworking its admitted power to sell. But such misuser would be a cause of forfeiture, and it would seem to be settled, though it is not necessary here to pass upon the question, that a cause of forfeiture can be taken advantage of by the government alone and in proceedings instituted for the purpose: Leazure v. Hillegas, 7 S. & R. 319; Baird v. Bank, 11 S. & R. 418; Goundie v. Northampton Water Co., 7 Barr (Pa.), 239. The Banks v. Portiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706, was a bill for the specific performance of a contract for the purchase of lands made by an individual with the plaintiffs. The defense set up was that the charters of the banks, after authorizing them to purchase, hold and enjoy lands and tenements, goods and chattels to a specified value, and sell and dispose of them, provided that the lands it should be lawful for them to hold should be only such as were for their immediate accommodation or acquired in satisfaction of debts. The court of appeals decided "that though if, in purchasing the land in question the banks violated their charter, they might for that cause be dissolved by a proceeding at the suit of the commonwealth, yet that any conveyance made before dissolution would pass an indefeasible title to the purchaser; that the charter did not prohibit the purchase of real property by the banks, but only limited the extent to which they should be allowed to hold such property; and that the question whether they had exceeded their limits or not was not fit to be tried in the suit before them, at the instance of the party before them": Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Barrow v. Nashville & Charlotte Turnpike

Co., 9 Humph. (Tenn.) 304. It is undoubtedly true, however, that the official conduct of corporate officers may be reviewed and their acts affirmed or avoided at the suit of stockholders or creditors and the like; but under no circumstances can this be done at the instance of a stranger or of a subsequent purchaser, buying as the plaintiff must be presumed to have bought in this case, with notice of an equitable title already vested in a third person. A subsequent purchaser, under such circumstances, holds subject to the equitable right.

Fourth. We have stated that the "errors of law occurring at the trial" are so imperfectly developed in the statement that we cannot get behind the rulings complained of. To this, however, there may be a single exception. It appears that one Creegan had testified on the part of the defendants to the contract agreed upon at the meeting of the stockholders of the Eureka Lake Company in September, 1860, and that for the purpose of corroborating the evidence of the witness as to the scope and character of that contract, the defendants offered in evidence a deed subsequently executed to the Eureka Lake Water Company of all the property belonging to the old company, which deed was signed by the stockholders and by its trustees as such. It was not on its face the deed of the company. The deed was objected to but was received, and the plaintiff excepted.

The defendants relied upon a subsequent ratification by the company of the unauthorized contract of its stockholders, and the instrument was admissible for the purpose of proving the existence and character of the contract so subsequently ratified.

All the other questions raised in the discussions have not been considered, but there are none of them of sufficient interest to require special notice.

Judgment affirmed.

We concur: Currey, C. J.; Rhodes, J.; Sawyer, J.; Sanderson, J.

FLEMING, Appellant, v. INGALLS, Respondent.

No. 901; December 21, 1866.

**Election Contest—Answer.—The Act Relating to Elections** (Hitt. Dig., art. 5, p. 2471) does not require the defendant, in order to meet the complaint of one contesting his election, to put in an answer, all the allegations of the complaint being understood by law to be denied.

APPEAL from Amador County.

Hardy, Dudley & Armstrong for appellant; E. G. Hall for respondent.

SHAFTER, J.—This is an appeal from the judgment of the county court of Amador county confirming the election of the defendant to the office of supervisor for supervisor district No. 1 in said county.

The appellant alleges in his statement of contest that he is a qualified elector of said supervisor district No. 1, and was such qualified elector at the date of the general election in September, 1865. The act relating to elections (Hitt. Dig., art. 5, p. 2471) does not require the defendant in a proceeding like the present to put in an answer to the complaint of the contestant, and all the allegations are therefore to be taken as denied, including the allegation of the contestant's capacity to prosecute: Dorsey v. Barry, 24 Cal. 449; Searcy v. Grow, 15 Cal. 118. The defendant in this case, however, filed an answer in which the averment that the contestant was a qualified elector of supervisor district No. 1 was directly denied. The case was submitted without any evidence having been introduced to prove the truth of the averment, and it follows that the conclusion of law arrived at by the court and on which the judgment is based is free from objection.

Judgment affirmed.

We concur: Sawyer, J.; Currey, C. J.; Rhodes, J.; Sanderson, J.

PEOPLE, Appellant, v. JOSE R. DE LA GUERRA, Respondent.

No. 1069; December 24, 1866.

**Indictment—Specification of Facts of the Offense.**—An indictment for crime must conform substantially to the requirements of sections 237 and 238 of the Criminal Practice Act, and must state the facts constituting the offense in ordinary and concise language.

APPEAL from County Court, Santa Barbara County.

Attorney General for appellant; A. Packard for respondent.

CURREY, C. J.—The defendant, the sheriff of Santa Barbara county, was indicted under the sixty-sixth section of the act concerning crimes and punishments, for the crime of embezzling and stealing certain personal property belonging to the county: Laws 1850, p. 236. He demurred to the indictment on the grounds: "1. That it does not substantially conform to the requirements of sections two hundred and thirty-seven and two hundred and thirty-eight of the Criminal Practice Act, and that it does not state the facts constituting the offense in ordinary and concise language; 2. That more than one offense is charged in the indictment; 3. That the facts stated do not constitute a public offense."

The court sustained the demurrer on the second ground assigned and gave judgment for the defendant.

We are of the opinion the judgment should be affirmed, not for the reason that more than one offense is charged in the indictment, but for the cause of demurrer first assigned.

Judgment affirmed.

We concur: Sawyer, J.; Sanderson, J.

JOHN C. SACK, Respondent, v. JOHN S. ELLIS, Sheriff, Appellant.

No. 1125; March 27, 1867.

**Attachment — Wrongful Seizure.—In an Action Against a Sheriff** for the recovery of goods of the plaintiff, seized by him as being the goods of another person in an attachment proceeding against that person, the plaintiff has made out a prima facie case when he has proved possession at the time of the seizure.

**Attachment — Wrongful Seizure.—In an Action Against a Sheriff** for the recovery of goods of the plaintiff seized by him as the goods of another, the plaintiff, having rested after proving possession at the time of the seizure, may introduce evidence of the bona fides of such possession in rebuttal if the defendant meantime has put in testimony tending to show fraud. Such evidence would not be cumulative.

APPEAL from Twelfth Judicial District.

A. J. Gunnison for respondent; E. A. Laurance for appellant.

SHAFTER, J.—This is an action to recover the possession of certain merchandise claimed by the plaintiff as his property. The defendant justified the seizure and detention of the goods by virtue of a writ of attachment issued in Lander v. Tennent, to whom the answer averred the goods to belong. The only question litigated at the trial was as to the truth of this averment.

First. At the close of the plaintiff's evidence the defendant moved for a nonsuit on the ground that the plaintiff had not made out a prima facie case. The motion was overruled.

The plaintiff introduced but one witness—who testified that the plaintiff was in possession of the goods at the time they were attached as the property of Tennent. The counsel of the defendant is mistaken in supposing that there is anything in the testimony of the witness tending to prove that the goods sued for were purchased by the plaintiff of Tennent, or that they ever belonged to him, or were ever in his possession. But should it be admitted that the evidence tended to prove that the plaintiff derived his title from Tennent, still

inasmuch as the plaintiff was in possession of the goods at the date of the seizure, according to the testimony of the witness, the prima facie case of the plaintiff would be perfect nevertheless.

Second. The defendant, being put to his defense, undertook to prove fraud both in law and in fact. There is nothing in the case calling for any detailed discussion of the evidence introduced by the parties respectively, in connection with the question of fraud in either of the aspects named. We are satisfied with the finding, and so much so that we should have felt ourselves called upon to grant a new trial had the finding been the other way.

Third. After the close of the defendant's testimony the plaintiff was allowed to call a witness to prove that his purchase from Tennent was in good faith and for a bona fide consideration.

This evidence was not cumulative to that which the plaintiff had introduced in his opening, but in rebuttal of the defendant's evidence in support of his defense of fraud.

Judgment affirmed.

We concur: Rhodes, J.; Currey, C. J.; Sanderson, J.; Sawyer, J.

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## CHARLES HENDRICK, Respondent, v. C. M. HITCHCOCK, Appellant.

No. 1047; March 28, 1867.

**Appeal—Specification of Errors.—On Appeal from an Order Denying a Motion** for a new trial, the order is to be affirmed in all cases where the statement contains no specification of the particulars in which it is claimed the evidence was insufficient to justify the decision, or of the alleged errors relied upon for a reversal.

APPEAL from Fourth Judicial District, San Francisco County.

Collins & Clement, for respondent; Cope, Daingerfield & Hambleton for appellant.

CURREY, C. J.—In this case judgment was rendered for the plaintiff, whereupon the defendant gave due notice of motion for a new trial. The defendant then prepared and filed a statement to be used on such motion, which was settled by the judge of the court as correct. The motion being denied the defendant appealed from the order and also from the judgment, and has brought up the same statement to be used on appeal in this court. The plaintiff takes the ground that the statement contains no specification of the particulars in which the evidence is insufficient to justify the decision and judgment; nor any specification of the particular errors upon which the defendant has relied for a reversal of the judgment and a new trial, and therefore insists that the statement must be disregarded by this court, as the statute declares it shall be in such cases: Prac. Act, sec. 195. We have in several cases declared the statutory consequence of such omission: Hutton v. Reed, 25 Cal. 482; Burnett v. Pacheco, 27 Cal. 410; Vilhac v. Biven, 28 Cal. 413. Yet all that has been said on the subject seems to have been disregarded on the part of the appellant in this instance, and as a consequence the statement must be disregarded.

No cause for a reversal of the judgment appears upon the judgment-roll, and therefore the judgment and order must be and is hereby affirmed.

We concur: Sanderson, J.; Rhodes, J.; Sawyer, J.; Shafter, J.

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PEOPLE ex rel. ANDERSON, Appellants, v. JAMES C. PENNIE, Respondent.

No. 1352; April 12, 1867.

**Justice of Peace.—After Payment of the Sum of Two Dollars to a justice of the peace, required to be paid by a party on beginning an action in his court, an additional sum of three dollars is to be paid him only in the event of there being an actual trial of the case.**

McCullough, and William Hayes for appellants; S. F. Reynolds and W. and S. Patterson for respondent.

SHAFTER, J.—Mandamus. The complaint alleges that the defendant is the justice of the peace of the third township of the city and county of San Francisco. That on the 4th of March, 1867, one James G. Gould commenced an action in said justice court against the relator herein, to recover the sum of eighty-seven dollars and costs of suit. That summons was issued, served and returned, and that on the return day the plaintiff in said action filed with the said justice the following order:

"In the Justices' Court of the Third Township in and for the City and County of San Francisco.

"James G. Gould
vs.
F. C. Anderson.

"Entry of Judgment on Discontinuance.

"James C. Pennie, Esq., Justice of the Peace, Third Township, in and for the City and County of San Francisco.

"Sir: Please enter judgment of discontinuance and satisfaction in the above-entitled case.

"San Francisco March 16th 1867.

"Yours respectfully,
"BUCHAN & WADE,
"Attys. for Plff."

That thereupon the relator, defendant in said action, requested the defendant herein to enter a judgment according to the said order, with which request the defendant refused to comply, unless the relator, or the plaintiff in said action, should pay him the sum of three dollars as his fees for the entry of said judgment; and the said defendant still neglects and refuses to enter the said judgment except upon compliance with the said unlawful demand. It is further alleged that all the fees due in said action, to wit, the sum of two dollars for all services required to be performed by the defendant before trial, have been paid to him, and that no other fees are due.

A peremptory mandate is prayed for, directing the defendant to enter the judgment named in the order of Gould. The case has been submitted as on demurrer to the complaint.

The question raised turns upon the construction to be given to the fifth section of "An act to regulate fees in the city and county of San Francisco," approved Feb. 6, 1866: Acts 1865–66, p. 66. The section is as follows: "The justices of the peace, severally, shall be allowed in any action before them, for all services of every kind whatsoever required to be performed by them before the trial in such action, two dollars; and for the trial and all proceedings subsequent thereto, including all affidavits, swearing witnesses, and jury, and the entry of all judgments therein, three dollars; and under no pretext whatever shall said justices, in any one action, be authorized or legally entitled to ask, demand, or receive any other or further fee or charge, except for copies of papers on appeal, as hereinafter provided."

For the purpose of settling the fees of justices of the peace—the subject matter to which this section relates—actions are distinguished by it into two classes: first, those in which a trial has been had, and second, those in which a trial has not been had. Counsel differ as to what constitutes a trial within the meaning of the section. In our judgment there is no reason for believing that the word is used in a sense differing from the definition universally given to it by law-writers, viz., the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. Assuming this definition, we proceed with the argument. In the first class of actions named, that is, actions in which a trial has been had, it will be observed that the interval between the beginning and the ending of the action is divided into two periods: the first reaching from the commencement of the action inclusive to the trial; the second, extending from the trial to the judgment; that is, from the inception of the trial to the perfecting of the judgment. The amount of judicial service performed during these respective periods will vary with the circumstances of each particular case; but how great soever these variations may be matters not, for the compensation has respect to stages of service, rather than to its quality or amount. In this class of actions there is only one thing the preference of which is always essential, and that is the fact of trial—the inception of which divides the two periods from each other. For the first period the fee is two

dollars which pays for all the service which the period necessarily involves, or may chance to involve. For the second period the fee is three dollars, involving nothing necessarily in our judgment, except a trial commenced, but should the trial be a full one, then involving it with all its incidents, and the judgment entered upon the verdict or other decision.

As to the second class of cases contemplated by the section under consideration, that is, cases where there has been no trial, the rule of the section is, that "under no pretext whatever shall said justices in any one action be authorized or legally entitled to ask, demand or receive any other or further fee, or charge except for copies of papers on appeal as hereinafter provided." This negative provision is one of the features that distinguish the act of 1866 from the act of April 22, 1858: Stats. 1858, p. 231. By the sixth section of that act it is provided that "justices of the peace severally, shall be allowed in any action before them, for all services required to be performed by them before trial, two dollars. For the trial and subsequent proceedings, including all affidavits, swearing witnesses and jury, and the entry of a final judgment three dollars." The negative provision referred to must have been purposeless, or else it was added to the section as reproduced in 1866 for the purpose of making it still more manifest that the fee of three dollars could not be claimed except in cases where a trial had either been had or attempted. We say "attempted," for the reason that a justice is not bound to enter upon the trial of a case, except on a payment or tender of the prescribed fee of three dollars. Further: If the right to the three dollars does not depend upon the fact of trial, fees to the amount of five dollars may be claimed in all cases; but if that was the intention of the legislature, why was not that sum stated in gross? Why divide it into sums of two and three dollars—and above all, why make the two dollars payable for services before the happening of an event and the three dollars payable after the happening of the same event, when the event in a large majority of cases would not be likely to happen at all?

It is ordered that peremptory mandamus issue according to the prayer of the complaint.

We concur: Currey, C. J.; Sawyer, J.; Sanderson, J.; Rhodes, J.

PEOPLE, Respondent, v. C. VAN RIPER, Appellant.

No. 1252; July 15, 1867.

**Criminal Law.—On a Trial for an Attempt to Poison,** an instruction that such an attempt, in order to merit conviction, must be by some act independent of mingling the poison with medicine is properly refused, when it has been proved that the poison was not only so mingled but was maliciously exposed under such circumstances that the party it evidently was intended for would be likely to take it.

APPEAL from County Court, Butte County.

Attorney General for respondent; A. Maurice for appellant.

SHAFTER, J.—The defendant was indicted under the forty-fifth section of the Crimes Act for willfully and maliciously administering poison (strychnine) to one Donley. The jury found the defendant "guilty of an attempt to poison as charged in the indictment": Crim. Prac. Act, sec. 424.

There is only one point of error made by the defendant of sufficient interest to require discussion. The counsel of the defendant requested the court to charge the jury that "an attempt to commit poison (that is, the crime of poisoning) must be by some act independent of the mingling the poison with medicine." The instruction was refused.

We consider that the instruction was properly refused, for there was nothing in the evidence giving any countenance to the hypothesis upon which the request proceeded. There was no conflict in the evidence, and it all tended to prove, not that the defendant merely mingled strychnine with Donley's medicine, but that, having so mingled it, he maliciously exposed the mixture under such circumstances that Donley would be likely to take it. On that state of facts, the court was not called upon to tell the jury what it would be proper for them to do had they had another and different case to deal with. Had the instruction been given it would have tended to mislead the jury.

Judgment affirmed.

We concur: Sawyer, J.; Sanderson, J.; Rhodes, J.; Currey, C. J.

JOHN G. GIMMY, Appellant, v. HENRY LIESE et al., Respondents.

No. 1371; October 21, 1867.

**Evidence.—The Evidence of One Who is, or has Been, a Judge** of court as to how he would have decided a case had it come to him for decision years before is not admissible.

**Divorce—Collateral Attack on Decree.**—The question whether a judgment in a divorce suit was erroneous or regular, or whether the relief granted was within the power of the court to grant, cannot be raised in a separate proceeding, especially after the divorce judgment has been affirmed on appeal.

APPEAL from Twelfth Judicial District, San Francisco County.

D. W. Perley for appellant; S. W. Holladay for respondents.

SAWYER, J.—This is an action to vacate, on the ground of fraud in obtaining it, a judgment in a suit for divorce, as to that part of said judgment which adjudges and sets apart to the wife, the plaintiff in the divorce suit, a lot of land then occupied and claimed by her as a homestead. The court found the issues against the plaintiff and rendered judgment for defendant. There is nothing in the record to justify us in setting aside the finding on the question of fraud, or any other issue of fact; and the allegations of fraud were put in issue.

The court properly refused to allow Judge Campbell to answer the question propounded to him by appellant. His answer could at best have been only a conjecture as to what he might have done years ago, as judge, upon a supposed state of facts. The questions as to whether the judgment in the divorce suit was erroneous or regular, or the relief afforded within the power of the court to grant, was determined by our predecessors on appeal from the judgment itself. This was the very question to review which the appeal in that cause was taken, and the determination, whether right or wrong, is final.

Judgment and order denying a new trial affirmed.

We concur: Sanderson, J.; Rhodes, J.; Shafter, J.; Currey, C. J.

## HENRY ENO, Appellant, v. THOMAS CARLSON, Respondent.

No. 1399; October 21, 1867.

**Judges—Payment of Salaries.—The Words "as in Other Cases,"** occurring in the act of February 27, 1865 (Stats. 1865, p. 123), directing the county treasurers of Alpine county to pay the warrants issued to the county judges for their salaries and by the judges presented to such treasurers for payment, justify the payment of such warrants with other warrants according to the order in which all are registered.

**Judges—Payment of Salaries.—The Fifteenth Section of the Constitution** requiring the salaries of county judges to be paid "at stated times" does not execute itself, but is directory to the legislature merely; and the legislature in carrying out such direction passed the act of February 27, 1865, making the salary of the county judge of Alpine county payable monthly by warrant from the auditor, which warrant the treasurer is to honor on presentment the same "as in other cases."

APPEAL from Sixteenth Judicial District, Alpine County.

C. Burback for appellant; McCullough for respondent.

SHAFTER, J.—This is an appeal from the judgment of the district court, denying to the appellant, the county judge of Alpine county, a writ of mandate to compel the defendant, the county treasurer of said county, to pay him his salary.

The ground of the treasurer's refusal was, that at the time of the presentation of the warrant by the appellant for his salary, there was no money in the treasury, not otherwise appropriated, for its payment. All the moneys in the treasury were applicable to the payment of other warrants which had been properly presented and refused payment for want of funds and registered in their order prior to the presentation of the warrant of the appellant. Some of those warrants presented and duly registered prior to that of the appellant were for the salary of a former county judge—a debt of the same character and at least of equal dignity with that of the appellant.

It is provided by the act of February 27, 1865 (Stats. 1865. p. 123), that the salary of the county judge of the county of

Alpine shall be paid monthly; and the auditor is directed to draw his warrant on the treasurer therefor on the last day of each month, and the treasurer is directed to pay the same, "as in other cases." In other cases, warrants are to be paid in the order of registration, and they are to be registered by the treasurer in the order in which they are presented. From this it is apparent that the treasurer, in refusing to pay the appellant's warrant, acted in conformity to the statute.

But it is urged that the direction to the treasurer, to pay the warrants of the county judge, "the same as in other cases," is null and void for the reason that it is contrary to the fifteenth section of the sixth article of the constitution, requiring the salaries of county judges to be paid at "stated times." The point is not well taken. This provision of the constitution does not execute itself. It is directory to the legislature merely. Certain it is that it lays down no rule for the guidance of the disbursing officers of the government; therefore there can be no such conflict between the statute and the constitution as would justify the defendant in attempting to reason out his duties from the constitution, instead of accepting them as the legislature has seen fit to define them. The office of county treasurer is created by the statute, and all its duties and methods are of like origin. The relations of county treasurers are, in short, with the statutes under which they hold, and if the legislature has not as yet fulfilled the constitution in the matter of the payment of judicial salaries, it is a delinquency for which there can be neither redress nor correction under our system, except by refusal to accept judicial appointments, or resigning them when they may have been accepted, or by appeal to the people.

Judgment affirmed.

We concur: Sanderson, J.; Rhodes, J.; Currey, C. J.; Sawyer, J.

JOHN CONLEY, Petitioner, v. W. S. PRICE, Respondent.

No. 1142; October 21, 1867.

**County Treasurers are not Required to Pay Auditors' Drafts unless the consideration upon which they were issued is stated and vouched for by the auditor on the face of the paper.**

Creed Haymond and J. D. Goodwin for petitioner; Coffroth & S—— for respondent.

SHAFTER, J.—Petition for mandamus. Demurrer to petition. There is neither a brief nor points and authorities on file for the petitioner.

The case is apparently within the rule laid down in People v. Gray, 23 Cal. 126. On the authority of that case the complaint is considered by us to be insufficient. We further hold the petition to be defective, for the reason that neither of the auditor's warrants "specifies the liability for which it was drawn," as required by the act creating a board of supervisors in the counties of the state: Wood's Dig., p. 695, sec. 14. County treasurers are not required to pay auditor's drafts unless the consideration upon which they were issued is stated and vouched for by the auditor on the face of the paper. Petition dismissed.

We concur: Rhodes, J.; Sanderson, J.; Sawyer, J.; Currey, C. J.

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JUANA WATTS, Appellant, v. W. M. CRAWFORD, Respondent.

No. 1265; October 21, 1867.

**Appeal—What Should be Shown by Record.**—On appeal from an order refusing to grant a motion for a new trial the record should always show either by a copy of the order or by direct statement, what the ruling was and what the appeal is from.

**Appeal—An Objection to the Record on the Ground** that it does not show what was the ruling appealed from or the motion below for a new trial will not be considered if not taken in time under the rule.

APPEAL from Fifth Judicial District, Tuolumne County.

Quint & Redmond for appellant; Dorsey & Holsey for respondent.

SAWYER, J.—This is an action to recover a large number of horses claimed as the separate property of the plaintiff. The pleadings are exceedingly loose on both sides, the case was loosely tried, and the whole proceedings, down to and including the transcript, are loose. Plaintiff moved to strike out several paragraphs of the answer as irrelevant and immaterial, but it is impossible to tell from the description what parts are intended. The paragraphs are not numbered, and it is uncertain what the moving party regards as the third, sixth, ninth, etc., paragraphs. There is much irrelevant and immaterial matter which ought to have been struck out. The whole of the answer commencing at folio 13 of the printed transcript, and continuing down to the prayer for a return of the property, is irrelevant and immaterial, and should have been struck out upon a proper motion made for that purpose. There is nothing in it constituting, or that can be made to constitute, a defense. If the horses were the separate property of the wife, the husband had no authority to make the disposition of them stated. If they were not her separate property, she, of course, cannot recover, and the long story told in that part of the answer is immaterial and irrelevant in any view that can be taken. So, also, several of the previous attempted denials of the allegations of the complaint are insufficient to raise an issue, and might have been struck out as irrelevant and immaterial, on a proper motion specifically pointing out each defective denial to which exception is properly taken on that ground: Gay v. Winter, present term. Parties moving to strike out must specify with precision the objectionable matter. We think the evidence clearly shows that a large portion, at least, of the horses was the separate property of the plaintiff. If so, the husband had no authority to turn them out to defendant for the purpose stated in the answer. We think the evidence clearly insufficient to support the finding. Conceding that any of the horses belonged to the husband—and it is at least doubtful whether any of them did—the particular horses belonging to the wife were not, it is true, very clearly

identified. But it is so manifest from the testimony that a large portion of them at least was the separate property of the plaintiff, that we think her entitled to a new trial.

There was a motion for a new trial, but it is not directly shown what the ruling was on the motion, and objection to the record is taken on that ground; but it was not taken in time, under our rule. The record should always show, either by a copy of the order, or direct statement, what the ruling was and what the appeal is from. It only appears inferentially in this record, and had the objection been taken in time, the appeal would have been dismissed unless obviated on suggestion of diminution of a record and leave to supply the defect.

Judgment and order denying a new trial reversed and new trial granted, with leave to both parties to amend their pleadings.

We concur: Sanderson, J.; Rhodes, J.; Currey, C. P.

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CHARLES H. WAKELEE, Respondent, v. GEORGE GOODRUM, Appellant.

No. 1257; October 22, 1857.

**Van Ness Ordinance—As Against One Entering Under Sale in Foreclosure.** [illegible] mortgage [illegible] for over six years in adverse possession as to the grantee of a deed subsequent to the mortgage so a grantee cannot maintain [illegible] under the Van Ness ordinance, if it is the intention of the [illegible] the property the mortgage was executed by [illegible] was brought there being a pile of lumber with on the premises by its grantors and not included in the deed, will [illegible] lumber be held [illegible] of the premises not [illegible] by [illegible]

**Evidence—Burden of Proof When Parties Rely for a Recovery upon Particular Deeds.** [illegible] who have put [illegible] and in possession, [illegible] and enjoyed it [illegible] if they are required to make [illegible]

APPEAL from [illegible] Court.

[illegible] for respondent. [illegible] for appellant.

SAWYER, C. J.—This is an action to recover possession of a lot situated on the corner of Twelfth, formerly Brown, and Howard streets, San Francisco. On the 7th of August, 1854, one William Sheer executed a deed purporting to convey the premises in question, being two hundred and sixty-eight feet long on Twelfth street by one hundred and forty-five feet wide on the westerly end, and one hundred and twenty-eight feet, nine inches at the other on Howard street, to Biggs, Kibbe, and Overton. At the same time by another deed said Sheer conveyed to said Biggs, Kibbe and Overton another tract adjoining on the westerly end, and extending one hundred and thirty-two feet farther on Twelfth street, making the whole tract embraced in the two deeds four hundred feet long on Twelfth street. Sheer had no title except possession. On the 16th of January, 1855, said Biggs, Kibbe and Overton mortgaged the whole of these two tracts to defendant, Goodrum, to secure payment of the sum of four thousand dollars and interest, at the rate of three per cent per month; mortgage duly recorded on the same day. On the first day of April, 1855, Biggs, Kibbe and Overton executed and delivered to Edward H. Whiting a deed, purporting to convey to him the first-mentioned tract—the premises in question—which deed was recorded May 4, 1855. On the 25th of July, 1855, Goodrum commenced a suit to foreclose his said mortgage, filing a notice of lis pendens, making the mortgagors parties, but said Whiting was not made a party. This mortgage was regularly foreclosed as to everybody except Whiting, the property sold under the judgment, and purchased by Goodrum, who received the sheriff's deed, purporting to convey the land including the premises in question, on the 20th of May, 1856. Goodrum soon after entered into possession under said sheriff's deed, and he has ever since been in the adverse possession, claiming under said conveyance. The land is within the limits of the so-called Van Ness ordinance, and five years have not elapsed since the final confirmation of the city's claim to title under the Mexican government.

Whiting conveyed on the 1st of May, 1862, to Dibble and Byrne, who, in August following, conveyed to plaintiff. Plaintiff claims through Whiting on the ground that his interest was not cut off by the foreclosure suit. The defendant sets up the statute of limitations, which is clearly a good de-

fense, unless plaintiff can connect himself with the title of the city through the Van Ness ordinance. This he attempted to do. The court nonsuited him, but on a motion for new trial, the nonsuit was set aside, and a new trial granted. Defendant appeals from the order setting aside the nonsuit, and the question is, Did the plaintiff make out a prima facie case? The city of San Francisco by the ordinance referred to, granted all her right and claim to the lands within the corporate limits, "to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. one thousand eight hundred and fifty-five, and to their heirs and assigns forever. . . . . Provided, such possession has been continued up to the time of the introduction of this ordinance in the common council," etc.: Laws 1858, p. 521. By the terms of the ordinance, it is as essential that the "actual possession" should be continued till the introduction of the ordinance, as that it should have existed on or before the first day of January. On the second lot above described as conveyed by Sheer to Biggs, Kibbe and Overton, fronting one hundred and thirty-two feet on Brown, or Twelfth street, Biggs and Kibbe entered soon after the conveyance to them, and each built a house, and soon after they built a substantial fence around them, the fence on the side toward Howard Street being two hundred sixty-eight feet from Howard Street, separating the premises in question from the said other tract on which said houses were built, the same said two tracts having been conveyed to them by different deeds. Biggs and Kibbe occupied the houses till Goodrum took possession, in March, 1856. This undoubtedly shows an actual possession, in Biggs, Kibbe and Overton, to the tract on which their houses were built. But those acts alone do not extend their possession to the lot in question, which was a different tract conveyed to them by another deed, and which was shut out by the fence they constructed. But they did a little grading and hauled some timber on the premises in question with the intention of building a house for Overton, which intention was never carried out.

There was when they took the conveyance from Sheer one of those fences usually called "skeleton fences," made of scantling posts, four by four inches, with two strips of board one by four inches, nailed on for rails, around the half block,

including both tracts, and another adjoining on the west. After Biggs and Kibbe built their new fence between their houses and the premises in question, and after the lumber was hauled on the said premises for Overton's house, this skeleton fence remained on Twelfth and Howard streets, "partly up and partly down" on Twelfth street, down almost sixty feet on the street in front of the lumber, and in this condition, in connection with the new Biggs and Kibbe fence, and the fence in the rear built to inclose Wilson's lot, surrounded the said premises. Thus the lot stood at the time of the conveyance to Whiting on the first day of April, 1855. It may be conceded, for the purpose of the argument, that the commencing to grade and hauling lumber on the lot to build a house for Overton in connection with the skeleton fence was sufficient to make a prima facie case of "actual possession" in Biggs, Kibbe and Overton, within the meaning of the Van Ness ordinance. But "such possession must be continued" by Whiting for the full period limited by the proviso, to be available to pass the title to him. What evidence is there of "actual possession" in Whiting? None but the following: The fence as before mentioned—the skeleton fence on the streets, continuing in the condition last described, "partly up and partly down." The lumber deposited on the lot by the former claimants remained for a while, and Sheer says: "Mr. Whiting, their grantee, had the charge and sale of it. Don't know how long Whiting retained charge. The lumber remained there two or three months after Overton got back, sometime in 1855. The lumber was there when Mr. Whiting proposed to sell it." Overton returned in October, 1854. This is all the evidence of any kind whatever tending in the slightest degree to show a possession by Whiting. It does not appear that Whiting himself, or any tenant, or anybody in his employment, or by his authority, ever set foot upon the premises, or ever exercised any act of ownership over it, or ever set up any claim to it. It does not appear that he owned, or claimed to own, the lumber left upon the land by Biggs, Kibbe and Overton. The title to the lumber did not pass by the conveyance of the land. Whiting "had the charge and sale of it," of the lumber, but whether on his own account or somebody else does not appear. It was not put there by him, and was there while under his charge till sold, because it had been left by those who owned it. He

does not appear to have claimed any title to it. His action in respect to the lumber was no act of ownership, or indicating ownership of the land. The fact of its being there under the circumstances is of no significance on the question of dominion over the land. Had the lumber lain in the street, or on any other vacant lot, his action in regard to it, if he had charge of it, would have been precisely the same. Unless the skeleton fence, partly up and partly down on the street, without the party having ever set foot upon the lot, or performed any act of dominion or control, or setting up any claim, otherwise than is indicated by taking a deed and putting it on record, and having charge of some lumber, which other parties had left upon the lot till its sale and removal, constitutes an "actual possession" of the land, there is no evidence of any sort whatever tending to show that Whiting ever was in actual possession of the premises in question. The acts shown certainly do not bring the case within the definition of actual possession adopted in Wolf v. Baldwin, 19 Cal. 313, and which has since in numerous instances been given in instructions to jurors, which have been approved on appeal. Mr. Chief Justice Field in that case says: "By actual possession, as the terms are here used, is meant that possession which is accompanied with the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation or cultivation, or other appropriation, according to the locality and character of the particular premises. An inclosure, by an ordinary fence, of the premises, without residence thereon, or improvements or cultivation, or other acts of ownership, is of itself insufficient." And Mr. Justice Baldwin's opinion, although expressed in different phraseology, is to the same effect. This has been the approved construction of the "actual possession," required by the act for the last six years. There is nothing to indicate that Biggs, Kibbe and Overton were in possession, or exercised any domain or control over the premises, subsequent to their conveyance, or that Whiting ever took possession or exercised domain over the land. The possession, therefore, does not appear to have been continued till the introduction of the ordinance into the common council, or to have been interrupted by an intruder from

whom possession might have been recovered. Aside from a want of positive testimony to make out a prima facie case, there are circumstances of a negative character which throw suspicion on the plaintiff's case. Whiting was not examined as to his possession. Goodrum went into possession in March, 1856, under his conveyance, in pursuance of the sale, in his foreclosure suit, and he has been in the adverse possession for a period of more than eleven years. Six years had elapsed after Goodrum's entry before Whiting conveyed to plaintiff's grantor. That is to say, unless Whiting acquired title, under the Van Ness ordinance, the bar of the statute of limitations had attached in favor of Goodrum more than a year before Whiting conveyed, and it does not appear that Whiting during this long adverse possession ever set up any claims to the premises, under the Van Ness ordinance, or otherwise. If he really claimed title in good faith, or was conscious of having a good title under the Van Ness ordinance, it is scarcely probable that he would have remained silent so long. The case upon the record is liable to the suspicion that it may be one of that too large class of cases where parties, after a long lapse of time, have discovered some flaw in the proceedings by which parties have acquired title to land, and bought in the outstanding title after the property has become valuable for speculative purposes. It may not be a case of the kind, but whether it be or not, when parties rely for a recovery upon technical defects in the transfer of title to deprive others, who have purchased the lands in good faith and long improved and enjoyed them, under the belief that they owned them, [they] cannot complain if they are required to make by proofs a strict technical title.

In this instance we think the plaintiff failed to show a prima facie case, and that the district court was correct in granting the nonsuit. The nonsuit was set aside on the ground alone that it was improperly granted. In this we think the court erred.

Order setting aside the nonsuit, and granting a new trial, reversed.

We concur: Sanderson, J.; Shafter, J.; Currey, C. J.; Rhodes, J.

CHARLES H. WAKELEE, Respondent, v. GEORGE GOODRUM, Appellant.

No. 1267; October 12, 1868.

SAWYER, C. J.—The record in this case has been amended by stipulation, since the original opinion was filed, showing the facts to be, in some respects, different from the facts as they appeared in the original record, and as stated in the opinion of the court. Although there were some remarks based upon the erroneous statement, the amendment, in no respect, affects the point, upon which the case was decided. It is proper, however, that the opinion should be so modified as to correspond with the record as corrected. When the petition for rehearing was denied at the close of the last term, we had no time to make the necessary modification, and for this reason we file the modified opinion now. The action is to recover possession of a lot situated on the corner of Twelfth (formerly Brown) and Howard streets, San Francisco. On the 7th of August, 1854, one William Sheer executed a deed purporting to convey to Biggs, Kibbe and Overton a lot one hundred sixty-one feet three inches wide, on the westerly end, and one hundred twenty-eight feet nine inches at the other on Howard street, and four hundred feet long on Twelfth street. Said lot embraced the premises in controversy.

Sheer had no title except possession. On the 16th of January, 1855, said Biggs, Kibbe and Overton mortgaged the whole tract to defendant, Goodrum, to secure payment of the sum of four thousand dollars and interest at the rate of three per cent per month, mortgage duly recorded on the same day. On the first day of April, 1855, Biggs, Kibbe and Overton executed and delivered to Edward H. Whiting a deed, purporting to convey to him the easterly portion of said tract fronting one hundred twenty-eight feet nine inches on Howard street by two hundred sixty-eight feet on Brown, or Twelfth street, and one hundred forty-five feet in width at the westerly end, which deed was recorded May 4, 1855.

On the 25th of July, 1855, Goodrum commenced a suit to foreclose his said mortgage, filing a notice of lis pendens,

making the mortgagors parties, but said Whiting was not made a party. The mortgage was regularly foreclosed as to everybody except Whiting; the property sold under the judgment and purchased by Goodrum, who received the sheriff's deed, purporting to convey the land, including the premises in question, on the twentieth day of May, 1856. Goodrum soon after entered into possession under said sheriff's deed, and he has ever since been in the adverse possession, claiming under said conveyance. The land is within the limits of the so-called Van Ness ordinance, and five years have not elapsed since the final confirmation of the city's claim to title under the Mexican government.

Whiting conveyed, on the first day of May, 1862, to Dibble and Byrne, who in August following conveyed to plaintiff. Plaintiff claims through Whiting, on the ground that his interest was not cut off by the foreclosure suit. The defendant sets up the statute of limitations, which is clearly a good defense, unless plaintiff can connect himself with the title of the city through the Van Ness ordinance. This he attempted to do. The court nonsuited him, but on a motion for new trial the nonsuit was set aside, and a new trial granted. Defendant appeals from the order setting aside the nonsuit, and the question is, Did the plaintiff make out a prima facie case? The city of San Francisco, by the ordinance referred to, granted all its right and claim to the lands within the corporate limits, "to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, and to their heirs and assigns forever. . . . . Provided, such possession has been continued up to the time of the introduction of this ordinance in the common council," etc.: Laws 1858, p. 52. By the terms of the ordinance it is as essential that the "actual possession" should be continued till the introduction of the ordinance, as that it should have existed on or before the first day of January.

On that portion of the lot above described as conveyed to Biggs, Kibbe and Overton, constituting the westerly end of said tract fronting 132 feet on Brown, or Twelfth street, Biggs and Kibbe entered soon after the conveyance to them, and each built a house; and soon after they built a substantial fence around them—the fence on the side toward How-

ard street being two hundred and eighty feet from Howard street, separating the premises in question from the said other tract on which said houses were built. Biggs and Kibbe occupied the houses until Goodrum took possession, in March, 1856. This undoubtedly shows an actual possession in Biggs, Kibbe and Overton to the tract on which their houses were built.

But they did a little grading and hauled some timber on the premises in question, with the intention of building a house for Overton, which intention was never carried out. There was, when they took the conveyance from Sheer, one of those fences usually called "skeleton fences," made of scantling posts four by four inches, with two strips of board, one by four inches, nailed on for rails, around the half block, including both tracts, and another adjoining on the west. After Biggs and Kibbe built their new fence between their houses and the premises in question, and after the lumber was hauled on the said premises for Overton's house, this skeleton fence remained on Twelfth and Howard streets, "partly up and partly down" on Twelfth street, down almost sixty feet on the street in front of the lumber, and in this condition, in connection with the new Biggs and Kibbe fence, and the fence in the rear, built to inclose Wilson's lot, surrounded the said premises. Thus the lot stood at the time of the conveyance to Whiting, on the first day of April, 1855.

It may be conceded, for the purpose of this decision, that the entry on the other part of the tract, claiming the whole, and the commencing to grade and hauling lumber on the lot in question to build a house for Overton, in connection with the skeleton fence, was sufficient to make out a prima facie case of "actual possession" in Biggs, Kibbe and Overton to the whole, within the meaning of the Van Ness ordinance, But "such possession must be continued" by Whiting for the full period limited by the proviso, to be available to pass title to him. What evidence is there of "actual possession" in Whiting? None but the following: The fence, as before mentioned; the skeleton fence on the streets, continuing in the condition last described, "partly up and partly down." The lumber deposited on the lot by the former claimants remained for a while, and Sheer says: "Whiting, their grantee, had the charge and sale of it. Don't know how long Whiting re-

tained charge. The lumber remained there two or three months after Overton got back, sometime in 1855. The lumber was there when Whiting proposed to sell it." Overton returned in October, 1854. This is all the evidence of any kind whatever tending in the slightest degree to show an actual possession in Whiting.

It does not appear that Whiting himself, or any tenant, or anybody in his employment, or by his authority, ever set foot upon the premises, or ever exercised any act of ownership over it, or ever set up any claim to it. It does not appear that he owned or claimed to own the lumber left upon the land by Biggs, Kibbe and Overton. The title to the lumber did not pass by the conveyance of the land. Whiting "had the charge and sale of it," of the lumber, but whether on his own account or for somebody else does not appear. It was not put there by him, and was there while under his charge only till sold, because it had been left by those who owned it. He does not appear to have claimed any title to it. His action in respect to the lumber, so far as disclosed by the record, was no act of ownership or indicating ownership of the land. The fact of its being there under the circumstance is of no significance on the question of dominion over the land. Had the lumber lain in the street, or on any other vacant lot, his action in regard to it, if he had charge of it, would have been precisely the same. Unless the skeleton fence, partly up and partly down, on the street, without the party ever having set foot upon the lot or performed any act of dominion or control, or setting up any claim otherwise than is indicated by taking a deed and putting it on record, and having charge of some lumber, which other parties had left upon the lot, till its sale and removal, constitutes an "actual possession" of the land, there is no evidence of any sort whatever tending to show that Whiting ever was in actual possession of the premises in question. The acts shown certainly do not bring the case within the definition of actual possession adopted in Wolf v. Baldwin, 19 Cal. 318, and which has since in numerous instances been given in instruction to jurors, which have been approved on appeal. Mr. Chief Justice Field in that case says: "By actual possession, as the terms are here used, is meant that possession which is accompanied with the real and effectual enjoyment of the

GEORGE DOUGHERTY, Respondent, v. T. McALPINE, Appellant.

No. 1339; October 25, 1867.

**Taxation.—A Street Assessment, Levied and Collected** under the taxing power, is essentially a tax as to the property assessed, and the act authorizing the enforcement of its payment is constitutional.

**Taxation.—Taxes Do not Draw Interest Unless by Some Express** statutory provision to that effect, and there is no difference in this respect between general taxation and the species known as assessments.

APPEAL from Fourth Judicial District, San Francisco County.

O. L. Lane for respondent; R. P. & J. Clement for appellant.

SAWYER, J.—Action for street assessment in San Francisco. We think the demand appears to have been made by a party authorized to make it, and that plaintiff shows a right to recover as assignee. On the second point, that the work was not finished according to contract, we find nothing to take the case out of the principle adopted in Emery v. Bradford, 28 Cal. 86, and several subsequent cases. That part of the act authorizing the enforcement of payment of the assessment against the property benefited is constitutional. The assessment is levied and collected under the taxing power, and is, as to the property assessed, essentially a tax. The action is brought to enforce the collection of a species of tax: Emery v. Bradford, 29 Cal. 83; Emery v. San Francisco Gas Co., 28 Cal. 345; Hendrick v. Crowley, 31 Cal. 473. Taxes do not draw interest, unless there is some special statutory provision authorizing it: Perry v. Washburn, 20 Cal. 350. There is no difference in this respect between general taxation, and that species of public burdens or taxes known by the name assessments. They are not embraced in the terms of the general statute of this state upon the subject of interest. Our attention has not been called to any provisions requiring the payment of interest. The judgment is, therefore, erroneous in giving interest and must in this particular be modified.

The district court is directed to modify its judgment, by deducting the amount allowed for interest, and entering judgment, for the amount of the assessment, and costs of the court below. Further ordered, that appellant have judgment for costs of this appeal.

We concur: Sanderson, J.; Rhodes, J.; Currey, C. J.

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## HIMMELMAN, Respondent, v. JANSON, Appellant.

No. 1404; October 29, 1867.

**Constitutional Law.—In Regard to Curative Acts the Legislature** has the same power over "easements," or taxes levied for the improvement of streets in cities and incorporated villages, which it has over taxes levied for the purpose of revenue.

**Constitutional Law — Curative Statutes.**—Whenever the legislature has power to authorize an act to be done, it also has power to ratify and confirm it, if it has been done irregularly or not, in the mode previously prescribed.

APPEAL from Twelfth Judicial District, San Francisco County.

The action was upon a street assessment. No question was raised as to the legality, or the regularity, of the board of supervisors in regard to the work performed by the contractor. The evidence related exclusively to the establishment of certain official grades and to the grading of the street before the doing of the work for which the assessment was ordered.

I. R. Sharpstein for respondent; Winans & Belknap for appellant.

SANDERSON, J.—If, as claimed by counsel for the appellant, defects or irregularities exist in the proceedings of the board of supervisors, either in respect to the establishment of the official grade, or the macadamizing of the street, affecting their validity, they have been cured by the act of

the 8th of March, 1866 (Stats. 1865–66, p. 166). We do not find it necessary to discuss the constitutionality of that act in this place. Similar statutes have been before us repeatedly, and have been uniformly held to be constitutional. The legislature in this respect has the same power over "easements" or taxes levied for the improvement of streets, in cities and incorporated villages, which it has over taxes levied for the purposes of revenue. That any irregularity or informality in the levy or assessment of the latter may be cured by subsequent legislation is no longer open to controversy in this state. The general rule upon this subject is that whenever the legislature has power to authorize an act to be done, it also has power to ratify and confirm it if it has been done irregularly or not in the mode previously prescribed: Harlan v. Peck, present term.

Judgment affirmed.

We concur: Sawyer, J.; Rhodes, J.; Currey, C. J.; Shafter, J.

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LEWIS SCHUMACHER, Respondent, v. BAR ADLER, Appellant.

No. 1411; October 29, 1867.

**Contracts—Quantum Meruit.—On a Complaint, in an Action on a contract, setting out the contract in haec verba and performance by the plaintiff's assignor, except as excused by the defendant, and claiming the contract price throughout and payment in gold according to the terms of the contract, recovery cannot be asked as for a quantum meruit et valebat.**

APPEAL from Twelfth Judicial District, San Francisco County.

A. B. Bates for respondent; Tod Robinson for appellant.

SANDERSON, J.—The only question which need be noticed relates to the cause of action. If the suit is upon the contract, and not upon a quantum meruit et valebat, it is

conceded by the respondent that a nonsuit should have been granted.

We think the action must be considered as upon the contract. If the complaint be regarded as counting on a quantum meruit et valebat, it certainly is a novelty. It sets out the contract in haec verba, and alleges a performance on the part of the plaintiff's assignor, except as excused by the defendant, claims the contract price throughout and payment in gold according to the terms of the contract. Such is not the language of a complaint which counts on a quantum meruit or a quantum valebat. The language of the former is that the plaintiff has rendered certain services to the defendant, without any express agreement as to compensation, and that the same are reasonably worth a certain sum, which the defendant impliedly promised to pay, and for which he sues. So of the latter—that the plaintiff has furnished certain goods, without any agreement as to price, which are reasonably worth a certain sum, which the defendant impliedly promised to pay, etc. But we do not deem it necessary to analyze the complaint; the prayer for a judgment payable in gold according to the terms of the contract furnishes a key to the whole matter. Unless the action is upon the contract, there can be no judgment payable in gold. Moreover, the plaintiff sues as assignee of the contract and not of an account or money due for work and labor and materials. He shows no right of action except as assignee of the contract.

If we ignore the actual facts and look singly at the averments of the complaint, no doubt can be entertained as to the true cause of action. The true reason why the complaint was made to take its peculiar form, in view of the true facts of the case, is quite apparent. The pleader desired to obtain a gold judgment which he knew he could not get if he sued squarely upon his real cause of action, hence the peculiar form of the complaint. Whoever attempts the feats of the ring may reasonably expect the consequences which frequently follow. Whoever undertakes to ride two horses at the same time takes the risk of coming to the ground.

Order and judgment reversed and cause remanded for further proceedings.

We concur: Sawyer, J.; Currey, C. J.; Rhodes, J.; Shafter, J.

BELKNAP, Appellant, v. BYINGTON et al., Respondents; GARRISON, Intervener.

No. 908; November 1, 1867.

**Execution—Description of Property.—A Levy in Execution** and the subsequent proceedings, inclusive of the sheriff's deed, are not invalid because no lot of land existed having technically the designation contained in such execution, etc., if the designation was preceded by the words "known as," and it can be shown that at the time of such proceedings the premises so designated were so known and are susceptible of identification.

**Execution.—A Description Introduced by the Phrase "Known as"** is not vitiated by the subsequent phrase "marked on the official map," when the latter is a description false in fact.

**Execution—Property Acquired Subsequently to Filing of Transcript.**—The statute (Laws 1850, p. 444, sec. 184) referring to the lien of a judgment is not to be construed so as to limit property leviable to that owned by the judgment debtor at the time of the filing of the transcript, thus excluding subsequently acquired property.

**Execution — Venditioni Exponas.**—It is impolitic to disturb sales made by sheriffs under warrant of the ancient writ of venditioni exponas during the early days of the state.

**Special Administrator.—The Bringing of an Action Against Adverse Occupants** of the land of a deceased person by a special administrator, to conserve the rights of the estate, is within not only the right but the duty of such administrator, and it is proper for the probate court to give him express authority to bring the action.

**Special Administrator.—The Rights Conserved by a Special Administrator** in bringing an action against adverse occupants of the land of the deceased inures to successors to the right, title and interest of the deceased in the land.

**Municipal Corporation—Grant of Land to.—The Second Section of the Act of March 26, 1851,** granted and confirmed to the city of San Francisco the use and occupation of all the land described in the first section, and said grant is not affected by the exception made by the first section, which exception rests virtually on the impossible proposition that one person can be both grantor and grantee of the same deed.

**Deed.—The Reservation of Land for a Particular Use** imposes upon the owner no obligation to put it to that use, but he may devote it to any lawful use that may suit him, or may at his pleasure dispose of it.

S. M. Wilson for appellant; Sharp & Saunders for respondents and intervener.

CURREY, C. J.—This action was commenced on the 10th of April, 1860, by David P. Belknap, special administrator of the estate of David C. Broderick, deceased, to recover the possession of water lot No. 505, in the city of San Francisco. The defendants against whom the action was brought appeared and answered that they held the demanded premises as lessees under the city and county of San Francisco, and disclaimed any interest in the premises other than as such lessees, and therefore they prayed that said city and county might be allowed to intervene and defend for the defendants named and also for said city and county. The city and county of San Francisco also petitioned for leave to intervene as defendants in the action, on the ground that at its commencement she was the true and lawful owner of the premises described in the complaint and that the defendants sued were her lessees. The city and county was accordingly allowed to intervene and defend, and in her answer she controverted the material allegations of the complaint. Subsequently, in May, 1863, Wm. R. Garrison petitioned the court for leave to intervene as plaintiff, on the ground that he had succeeded to the interest of Broderick in the premises, and his petition was granted, and by his complaint he set forth facts constituting a cause of action against the defendants sued and against the city and county of San Francisco, which if taken as true, authorized and required judgment in his favor. To the complaint of Garrison the city and county answered, traversing its material allegations, and pleading the statute of limitations.

The issue so joined was tried in June, 1864, before the court and a jury. To maintain the issue on his part Garrison introduced in evidence:

1st. A judgment of the superior court of the city of San Francisco obtained on the 4th of March, 1851, by Peter Smith against the city of San Francisco and one M. Alsua, for something over forty-five thousand dollars, and evidence that a transcript thereof was duly filed in the office of the recorder of deeds in the county of San Francisco, on the 14th of that month, by which the same became a lien on all the real estate of the city in said county; and also evidence that an execution was duly issued on said judgment on the 10th of the

same month of March, and placed in the hands of the sheriff of the county, who upon that day levied upon the property in controversy with other property of the city, and advertised the same to be sold as provided by law in such cases, and that the sale was restrained by an injunction issued by competent authority on the 3d of April of the same year.

2d. A writ called a venditioni exponas, issued on the 22d of May, 1851, on the same judgment, which referred to the execution before then issued and the levy made by the sheriff upon certain property described therein, and to the enjoining of the sale, and then commanded the sheriff to cause to be sold the property so levied on, for the best price that could be obtained for the same, etc., which writ the sheriff's return, dated the twentieth day of August, 1851, shows was received by him on the day of its date, and that by virtue thereof he afterward sold all the right, title and interest of the defendants in and to the lot in controversy to David C. Broderick.

3d. A deed of conveyance bearing date the 25th of June, 1851, executed by John C. Hays, sheriff of the county of San Francisco, to David C. Broderick, which recited the issuing of an execution on said judgment on the 10th of March, 1851, and what he was thereby commanded to do, and that by virtue thereof he levied upon the right, title and interest of said city in and to certain real property, and advertised the same to be sold, and that on the day appointed for the sale he was restrained from selling by an injunction, and that the injunction was afterward dissolved, and then that another injunction was sued out which was also dissolved, and that afterward on the 22d of May, 1851, another writ, called a venditioni exponas, was issued upon said judgment commanding him to cause the property to be sold, etc.; and further recited that he, as sheriff, advertised said property to be sold, and that on the day and at the place named he sold the lot in controversy with others, to David C. Broderick, describing the same as "beach and water lots known and marked on the official map of said city now at the surveyor's office"; following which the numbers of the lots sold to Broderick were given, among which was said lot No. 505, and the price bid for the lots by the purchaser; and then follows the granting portion of the deed, granting and conveying to said Broderick and to his heirs and assigns forever, all the right, title and

interest which the said city of San Francisco had at the time of the filing of the transcript of said judgment in the recorder's office as aforesaid, or at any time afterward, of, in and to the last-mentioned and above-described land and premises. The deed was acknowledged and afterward on the 3d of September, 1858, duly recorded.

4th. The following acts with others passed by the legislature of the state of California, that is to say:

1st. An act to provide for the disposition of certain property of the state of California, passed March 26, 1851 (Laws 1851, p. 307).

2d. An act to incorporate the city of San Francisco, passed April 15, 1850 (Laws 1850, p. 223).

3d. An act to incorporate the city of San Francisco, passed April 15, 1851 (Laws 1851, p. 357).

5th. Evidence of the death of David C. Broderick on the 16th of September, 1859, leaving a last will and testament, etc.; and proceedings had in the probate court which resulted in a transfer of the title and interest which Mr. Broderick in his lifetime had in and to said lot, to the said Garrison.

Other evidence was produced on the trial by the appellant, when he rested his case. Whereupon the defendant by counsel moved the court to nonsuit the plaintiff, on the following grounds:

"First. That the proof fails to disclose that there were any such lots on the 10th of March, 1851, known and marked on the official plan as water lots Nos. 505, 506, 507, claimed in this action.

"Second. It does not appear that the city had any title to the demanded premises at the date of the levy; and no after-acquired title would inure to the benefit of the purchasers under the execution sale.

"Third. The right of entry to the plaintiff, if any ever existed, is barred to the intervener Garrison by the statute of limitations before the date of his intervention.

"Fourth. No right of entry ever vested in Belknap as special administrator.

"Fifth. The evidence shows a valid and irrevocable dedication to public uses, and the property was not subject to seizure and sale on execution."

The motion was sustained and judgment thereupon entered for the defendant, and from this judgment and an order made refusing to grant a new trial the plaintiff Garrison has appealed.

In considering the case we shall follow the order, so far as may be necessary, adopted by the counsel of the parties, who in behalf of their respective clients, have presented the case with much ability, confining ourselves to lot No. 505, as that is in fact the only lot in controversy.

I. The first ground assigned for a nonsuit was in substance that the proof failed to disclose that there was, at the time of the execution of the sheriff's deed or before then, any lot known and marked on the official map or plan of the city of San Francisco as water lot No. 505.

The sheriff's return, annexed to the execution issued to him, described certain of the parcels of land levied upon as beach and water lots known and marked upon the official map of the city of San Francisco at the surveyor's office. The numbers of the lots were designated, among which was lot No. 505. The writ of venditioni exponas contains a recital referring to the same lot as known and marked upon said map. And the sheriff's deed recites that by virtue of said execution the said sheriff did levy on and seize all the right, title and interest, which the said defendant, the city of San Francisco, had of, in and to the divers lots and parcels of land described in the advertisement of sale, made by virtue of said execution, among which lot No. 505 was described as one of "ten several beach and water lots known and marked on the official map of said city, now at the surveyor's office." So it appears that the lot was designated throughout the proceedings as beach and water lot No. 505, known and marked on the official map of the city. The counsel for the respondent, the city of San Francisco, maintains that if there was not at that time any lot or parcel of land designated on the map of the city as beach and water lot No. 505, the levy, under the execution, and the subsequent proceedings to and inclusive of the execution of the sheriff's deed, was abortive and invalid, because there was no lot of land answering the designation contained in the executions, advertisement and deed.

The official map of the city, to which reference was made, was produced in evidence, and witnesses were examined in

respect to the land described in the complaint as delineated on the map. It is not claimed on the part of the plaintiff that the number 505 was to be discovered on the map, but the evidence in the case tended at least to establish the fact that the gore of land bounded by Market, Front and Pine streets had been known and described as lots Nos. 505, 506, and 507 by the city authorities at a date anterior to the sheriff's levy thereon, and that these numbers were used on various occasions to designate the property—each of such numbers designating a distinct portion of the same—and that 505 was the number by which the demanded premises was known at the time of the levy thereon and the sale and conveyance made by the sheriff; and the appellant's counsel contends that the word "known," as used in the sheriff's return to the execution and in the sheriff's deed and elsewhere, does not mean known on the official map, by said number, while the word "marked" does so mean; that the real meaning of the word "known," considered in its relations to the context, is that the lot was known as lot No. 505, and that the designation of the lot as known by the number given is not vitiated or impaired by the words "marked on the official map," which is a description false in fact.

In the interpretation of the language used to describe the lot in question we are to ascertain, if it can fairly and reasonably be done, what was described. Was there in fact a beach and water lot answering the description? And was the description of it sufficient to a legal intent to identify the property? The maxim of the law is falsa demonstratio non nocet. In the application of this maxim to an instrument which contains a description of the subject matter, true in part and false in part, that which is false will be rejected and effect will be given to the instrument if that which is true is sufficient: Bosworth v. Denzien, 25 Cal. 298. As included in the maxim above quoted Lord Bacon applied the rule Praesentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis; which he illustrated by saying "If I grant my close called 'Dale' in the parish of Hurst, in the county of Southampton, and the parish extends also into the county of Berks, and the whole close of Dale lies in fact in the last-mentioned county, yet this false addition will not invalidate the grant": Broom's Maxims, 428. In the case

at bar the description is, in effect, beach and water lot known and marked on the official map of said city of San Francisco now at the surveyor's office therein as No. 505. The evidence tended to show that there was at the time such a lot, but it was not marked on said map by the number belonging to it, and by which it was known. The reference to the map as having the number of the lot marked upon it, if so read, was a falsa demonstratio, which, in our judgment, could not have the effect of vitiating the description of the lot by the number by which the evidence tended to show it was known.

II. Assuming that the lot was sufficiently described, the second ground on which the motion for a nonsuit was based was that it did not appear that the city had any title to it at the date of the levy under the execution, and that no after-acquired title could inure to the benefit of the purchaser under the sale made to satisfy the judgment of Smith against the city.

The execution issued on the Smith judgment was dated the 10th of March, 1851, and according to the sheriff's return the lot in question, with others, was levied upon, on the day of the date of the execution, and the property was advertised for sale. The sale was stayed by injunction issued on the 3d of April, 1851. At the time of issuing the injunction the property was advertised for sale and then for eight days the city had owned an interest and estate therein subject to be sold on execution. The Practice Act in force at the time provided that "all the real estate not exempted by law, whereof the defendant, or any person for his use, was seised on the day of the rendition of judgment or at any time thereafter," should be liable to be seized and sold on execution: Laws 1850, p. 444, sec. 184. The transcript of the Smith judgment was filed in the office of the recorder of deeds on the 14th of March, 1851, when, by section 172 of the same act, it became a lien on all the real estate of the debtor within the county of San Francisco. The language of the section is: "From the time of such filing, the judgment shall bind all the real estate of the debtor within the county in which the transcript is filed: Provided that if no execution be issued on the judgment within six months the lien shall be lost." A fair construction of this language did not limit the property to be so bound by the judgment to that which the debtor had at the

time the transcript was filed; but it embraced that subsequently acquired by the debtor while the lien subsisted and from the moment of the acquisition the lien of the judgment attached. Lot No. 505 was attempted to be levied on, as appears by the sheriff's return, before the transcript of the judgment was filed, and before the city had acquired any estate or interest therein, and it was advertised for sale at the time the injunction was issued. When the city acquired the right, title and interest granted by the act of the 26th of March, 1851, the property became eo instanti bound by the Smith judgment, and the writ afterward issued denominated a venditioni exponas was a sufficient warrant in the hands of the sheriff to authorize him to sell the lot in controversy, according to the decision in the case of Smith v. Morse, 2 Cal. 556. At that day writs of the kind named were in use, and sales made under them as authority were sanctioned by the courts, and we think it would lead to endless mischiefs to disturb and overthrow the sales made under them, even though we may not now be satisfied they were authorized to be issued by any express provision of the statute then in force relating to sales of real estate on execution. The sale of the lot in question was made on the 14th of June, 1851, to D. C. Broderick, to whom the sheriff executed a deed therefor. In our judgment the purchaser acquired, under the sale and the deed thereupon executed, title to the lot to the extent of the city's interest therein.

III. The third and fourth grounds for the motion to nonsuit the plaintiff may properly be considered together. It is insisted on the part of the respondent that no right of entry ever vested in Belknap as special administrator of the estate of the deceased, and that at the date of the intervention of Garrison his right of entry as the successor in interest of Broderick was barred by the statute of limitations.

At the time the action was commenced the right of action was not barred, even were it admitted that the defendants had then been in the adverse possession of the premises for five years: Laws 1855, p. 109; Billings v. Harvey, 6 Cal. 383; Billings v. Hall, 7 Cal. 1; Morton v. Folger, 15 Cal. 283, 284. Belknap was duly appointed the special administrator of the estate of the deceased on the 14th of December, 1859, and thereupon he duly entered upon the duties of the

office to which he was appointed. The probate court by order authorized him to commence and prosecute this action. By the eighty-eighth section of the probate act in force at the time, the probate judge had power in certain specified cases, to appoint a special administrator to take charge of the estate of a deceased person, and to exercise such other powers as were necessary for the preservation of the estate: Laws 1855, p. 133. If the lot in controversy was at that time in the adverse possession of the defendants, a greater necessity existed for the special administrator to take charge of it as a portion of the estate than would have existed had the defendants' possession been in subordination to the title of Mr. Broderick when he died; and it was his duty, falling within his powers as special administrator, to do whatever was necessary for the preservation of the property, and to that end he had the right to commence an action against the adverse occupants of the lot to recover its possession. This was not only his right, but it was especially his duty to do so, if that was necessary to prevent the adverse possession of the defendants ripening into a title.

Pending the action commenced by Belknap as special administrator, Garrison succeeded to the interest of the estate of the deceased in the lot, and he became by order of the court substituted as plaintiff in the action in the stead of Belknap. Such was the effect of his intervention and the order of the court thereon made: Prac. Act, sec. 16. The right conserved by the bringing of the action by Belknap inured to Garrison, who succeeded to the estate's right, title and interest in and to the lot, when the action was commenced. Any other rule would work manifest injustice in cases beyond the power of man to avoid or prevent.

IV. The fifth ground upon which the defendants moved for a nonsuit was that the evidence showed a valid and irrevocable dedication of the property to public uses, and therefore the same was not subject to seizure and sale on execution.

On the 31st of December, 1849, the ayuntamiento or town council of San Francisco passed a resolution authorizing the alcalde "to deed to the town of San Francisco, as a reserve forever," certain water lots, among which was said lot 505, described by its number, "to be reserved for public market and police stations and for no other purposes." Accordingly,

a few days thereafter "the town of San Francisco," by the alcalde, by deed "granted, bargained, sold, assigned, conveyed and confirmed, unto the said town of San Francisco, as a public reserve forever, the said water lot No. 505, situated in said town on the southeast corner of Pine and Front streets." It is not pretended that by this resolution, and deed from the town of San Francisco to the town of San Francisco, the town became invested with the title to the property described. If so it would be a complete answer to the objection that the city did not own the lot when the execution was issued on the Smith judgment; but it is claimed on the part of the city that such resolution and deed, together with the second section of the act of the 26th of March, 1851, granting and confirming all the lands and lots below high-water mark which had been sold or granted by the alcalde and confirmed by the ayuntamiento and recorded in some book of record then in the office or custody or control of the recorder of the county of San Francisco on or before the 3d of April, 1850, operated as a conveyance of the lot in question to the city for the uses and purposes expressed in the resolution and deed executed by the alcalde, which was in effect a dedication valid and irrevocable to public uses.

The second section of the act of March 26, 1851, in the first place grants to the city of San Francisco, for the term of ninety-nine years, the use and occupation of all the land described in the first section of the act, and then follows certain exceptions, one of which excepts all the lands, of the tract described, "which have been sold or granted by an alcalde of the said city of San Francisco and confirmed by the ayuntamiento or town council thereof, and also registered or recorded in some book of record now in the office, or custody or control, of the recorder of the county of San Francisco, on or before the third day of April, one thousand eight hundred and fifty, shall be and the same are hereby granted and confirmed to the purchaser or purchasers or grantees aforesaid, by the state relinquishing the use and occupation of the same and her interests therein to the said purchasers or grantees and each of them, their heirs and assigns, or any person or persons holding under them, for the term of ninety-nine years after the passage of this act." We are clearly of the opinion that the land granted by this act to the city

passed by the clause which is in the following words: "The use and occupation of the land described in the first section of this act is hereby granted to the city of San Francisco, for the term of ninety-nine years from the date of this act." The lands excepted from the above operative granting words are then designated, and granted and confirmed to the purchasers or grantees thereof. Was the city one of these purchasers or grantees? Clearly not, because the town of San Francisco could not be the grantee of the alcalde, who could only act in making grants as the representative of the town. In other words the town or city could not be both grantor and grantee; and further because it cannot be presumed the legislature intended the absurdity of granting to the city all the land described, excepting that which had been granted to the city and others already, and then granting to the city that which had been granted to her before then. If such could have been the legislative intention, then the grant to the city might be read as follows: "The use and occupation of the land described in the first section of this act is hereby granted to the city of San Francisco for the term of ninety-nine years from the date of this act, except the portion of said land which has been sold or granted to said city by any alcalde thereof, the use and occupation of which excepted portion shall be and is hereby granted to said city for the same term." We are satisfied the lot in question passed to the city under the first granting clause of the second section of the act in the same manner as the property not at all affected by previous grants passed, and that it was equally with the other beach and water lot property subject to the lien of the Smith judgment and liable to be sold on execution. From this view of the case the consideration of the question respecting a dedication of the lot to public uses, or a reservation of it to the city for particular purposes, is rendered unnecessary, though we may say the resolution of the ayuntamiento and the deed of the alcalde followed by the grant of the 26th of March, 1851, did not amount to a dedication of the lot to public uses, even were it assumed that the act of the legislature operated as a confirmation of the alcalde grant as it is denominated, and gave to it the same affect as it would have had, if the city or town had owned it absolutely when said resolution was passed and the alcalde deed was

executed. By the resolution and deed the lot was reserved for a public market and police station. The reservation did not amount to a dedication of the lot to public uses in the sense of the law, much less to an irrevocable dedication of it for a public market and police station, or the like, is manifest. A dedication of land by the owner to the public for a particular public use, if accepted by the donees of such use, is in its nature irrevocable; but whatever is the evidence relied on to establish a dedication to public uses, it must be sufficient to indicate unequivocally an intention on the part of the grantor to devote the use alleged to have been granted exclusively to the public: Irwin v. Dixion et al., 9 How. (U. S.) 30, 31, 13 L. Ed. 25; Pitcher v. New York and Erie R. R. Co., 5 Sandf. (N. Y.) 608. The reservation of the land for a particular use imposes no obligation on the owner to devote it to such use. He may apply it to any lawful use that may suit him notwithstanding, or he may dispose of it at his pleasure. At most, the lot in controversy was reserved for a public market and a police station. It does not appear that it has ever been used as a public market, that is as a market place open to the use of the public without charge, nor that it has been used as a police station. The defendants who were originally sued were the lessees or tenants of the city, from which it appears that the public had not enjoyed at any time the use for which the city claims a dedication was made.

We are of the opinion the order granting a nonsuit and the judgment thereupon entered should be reversed and a new trial granted, and it is so ordered and adjudged.

We concur: Rhodes, J.; Sanderson, J.; Shafter, J.

## PEOPLE, Respondent, v. SUPERVISORS SAN FRANCISCO COUNTY, Appellants.

No. 1233; November 1, 1867.

**Constables—Invalid Election.**—The election for constables in San Francisco in the year 1866 was held without authority.

APPEAL from Twelfth Judicial District, San Francisco County.

J. B. Felton and W. H. Culver for respondent; H. M. Hastings and S. M. Wilson for appellants.

SAWYER, J.—After a careful examination of the several statutes referred to by counsel, we are satisfied that there is no provision authorizing an election of constables, in the year 1866, in and for the city and county of San Francisco.

Judgment and order affirmed.

We concur: Curry, C. J.; Rhodes, J.; Shafter, J.

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## KING, Respondent, v. LOUDERBACK et al., Appellants.

No. 1242; November 1, 1867.

**Ejectment—Right to Maintain.—A Person Who, Though Asserting** some sort of claim to land, has never occupied it or used it for any purpose, has no such possession as to warrant one assuming to hold through him to maintain ejectment.

**Ejectment—Fence as Evidence of Possession.**—The mere fact that a person at some past time indefinite erected a "fence" around a piece of land, regardless of whether the structure was a substantial barrier or only a fence by assertion, is in itself no evidence of possession, so that one claiming title through such person can maintain ejectment.

APPEAL from Twelfth Judicial District, San Francisco County.

Crane & Boyd for respondent; Haight & Pierson for appellants.

SAWYER, J.—After a careful examination of the testimony, we are compelled to say that we do not think the evidence sufficient to sustain the finding that plaintiff was seised in fee of an undivided half of block No. 48, and entitled to possession; or the finding that on the 27th of August, 1862, plaintiff was lawfully possessed of the premises in controversy, and that defendant, Louderback, entered and ousted him. Plaintiff deraigns title through a series of conveyances from one Thorne, but neither title, nor possession, was shown in Thorne. The only actual possession attempted to be shown was in Woolen, one of the intermediate grantors of the plaintiff, as long ago as 1853; and the evidence was insufficient under the decisions of this court, and of our predecessors, to show possession in him. He never occupied, or in any manner used, any portion of the premises for any purpose whatever. There is no shadow of testimony to show occupation, or use. There was an attempt to show a fence made by Woolen, but it is of a very shadowy character; for it turns out on cross-examination in every instance, that although two or three of the witnesses saw a fence which they supposed was around the lot, they did not know it to have been constructed, or owned by Woolen otherwise than by hearsay from him. And the only specific description attempted of the fence seen by plaintiff's witnesses is that it "was an ordinary fence, made of scantling, with a rail on the top," which we understood to mean posts of scantling set in the ground, and one scantling rail on top. This is the fence spoken of by Nichols, one of the plaintiff's grantors who sold to Doble and Woolen. He says on cross-examination, "we did not fence the lot; Mr. Doble and his partner fenced it. I did not see them fence it, but they said it was their fence. Only know it from what they told me." Doble, being called by plaintiff, said: "There was nothing done with the property while I owned it. When Woolen owned it (Doble sold to Woolen) we put a fence around it, I saw the fence then." But on cross-examination he said: "I saw the land after it was fenced; I may have seen the fence very shortly after I sold; Mr. Woolen told me he fenced it, and I saw it fenced." Balentine saw the lot fenced

to Market street, but it was not fenced on Market street. It was not the Baldwin fence. He saw Woolen's men putting it up. "I know they were his men, because he told me so." Hayes spoke of the lot that "Bryant, Sindle, and Nichols claimed, and that Woolen afterward fenced." But on cross-examination he said, "I do not know to whom the fence belonged. . . . . I do not know if the lot was fenced in by Woolen or Baldwin; I only know that portion was fenced in." This is the evidence as to fencing by plaintiff's grantors, and there is no question of any possession in plaintiff or his grantors, except so far as the evidence of fencing and claiming the lots tends to show possession. On the contrary, the evidence is ample and uncontradicted that Elihu F. Baldwin was in the actual possession and occupation of the premises as early as 1853, 1854 and 1855. In August of that year he had received a conveyance of a large tract embracing in the description the premises in question, but the premises in dispute were excepted by express terms of exception in the deed. No interest in the premises, therefore, passed to him by the deed. Yet the premises, so far as the testimony shows, were not then in the actual possession of any party, and he inclosed them by a fence with the rest and went into possession of the whole tract. This appears from the testimony of Brown, one of plaintiff's witnesses, and of Baldwin himself. Baldwin also testifies that he put a picket fence around the block in controversy, in December, 1853, and improved it; that he occupied the premises as a garden three or four years; that he cultivated a part on the 1st of January, 1855, and used a part as a farm yard for cows and chickens; that he continued to use it till they began to grade for the railroad in 1857 or 1858; that Woolen attempted to fence it, and got up a line of fence along block 2, the block in question, another block and turned it toward block 1, but he, Baldwin, stopped him, and Woolen then went away; that no other attempt was over made to inclose it till Baldwin's brother put up the fence again after it was torn down by the railroad people. And it was admitted as a substitute for their testimony that four other witnesses named would testify to the same facts stated by Baldwin. Baldwin also testified as follows: "I occupied the lot that was excepted from my deed for my brother, in December, 1853; I occupied it for my brother Judson Baldwin."

Clearly, under the former decisions, there was no actual possession shown in Woolen, even upon the plaintiff's own showing, certainly no sufficient possession to confer any rights under the Van Ness ordinance: Wolf v. Baldwin, 19 Cal. 307; Davis v. Perly, 30 Cal. 630. While the testimony does show actual possession and actual use for various purposes in Baldwin from December, 1853, down, that there is nothing to show that the continuity of the possession was subsequently broken. And it shows that the possession was held for and on behalf of Judson Baldwin. But if not, the possession started in E. F. Baldwin, and in 1859, more than five years before the commencement of this suit, he conveyed to Judson Baldwin, from whom defendants derive title.

It is true that Doble, one of the plaintiff's witnesses, states, that in 1853, he went to E. F. Baldwin, who was then in possession of the lot, and asked him if he claimed it, and Baldwin said he did not, that it belonged to Balentine and Nichols, and when one or two others inquired for Balentine and Nichols' lot, Baldwin pointed out this lot to them. But this does not tend to prove the actual possession in those parties, or out of Baldwin. It was then in Baldwin's possession, inclosed by his larger fence, if not by the smaller inclosure—the picket fence, made in December, 1853, as appears by the testimony of both Brown and Doble, plaintiff's witnesses. This act of Baldwin could only bear upon the question as to the time when his possession became adverse. If Woolen ever made the fence of posts and one rail on top, it must have been between the 24th of October, 1853, the date of Doble's conveyance to him, or more likely the 27th, the date of the acknowledgment, and the 28th of the same month, the date of Woolen's conveyance to Dow. At most he could have had but four days, probably but one, within which to make the fence. Balentine gives the most particular account of Woolen's fence of any of plaintiff's witnesses, and he says that the lot was "not surveyed and fenced on Market street, it was fenced to those I have just mentioned (Hayes and Market). . . . . It did not run quite up to Market street." It was then not fenced along Market street nor quite to it. The fence does not seem by plaintiff's own testimony to have been completed so as to inclose the block in dispute. And this accords with Baldwin's testimony that he stopped him before the work was

accomplished. It is quite probable that this is the true state of the case, and this may account for Woolen's conveying so suddenly to Dow. But if completed as before stated, it is still insufficient of itself to constitute a possession.

Baldwin was not estopped by his conveyances from Brown and Carey from acquiring title to the premises in controversy by possession, or otherwise, or from denying that the title was ever in Thorne or his grantors. His conveyance was, at best, but a quitclaim, and it did not purport to convey the premises in question. He did not enter upon the premises in controversy, under Thorne. The cases cited by respondent are inapplicable to the facts of this case.

Under the view we take the judgment must be reversed and a new trial had, and it is so ordered.

We concur: Sanderson, J.; Shafter, J.

I concur in the judgment: Rhodes, J.

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KING, Respondent, v. LOUDERBACK et al., Appellants.

No. 1242; December 24, 1867.

SAWYER, J.—Respondent's counsel ask a rehearing to enable them to discuss the grounds upon which the decision is based. The place for discussing the points was in the briefs, as they were distinctly made by the appellant. But if the court had accidentally overlooked anything material, which the respondent could make plain, after seeing the ground taken in the opinion, the place for further discussion on their part was in the petition for rehearing. It was for that purpose that an opportunity was afforded to file a petition.

We are not ordinarily in the habit of granting rehearings, unless it is made apparent in the petition that we have been led into some error, or have overlooked something having an important bearing upon the decision, or unless the argument in the petition itself induces us to believe that there is some probability that our opinion may be materially modified.

There is nothing shown in this case to take it out of the ordinary rule.

Rehearing denied.

We concur: Rhodes, J.; Currey, C. J.; Sanderson, J.

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PEOPLE, Appellant, v. SAN FRANCISCO & SAN JOSE R. R. CO., Respondent.

No. 1178; November 2, 1867.

**Taxation.—There can Arise Against a Taxpayer No Cause of Action** for delinquency in a case where there has been no valid assessment.

**Appeal—Technical Errors.—Where** the Facts of the Case are such that a judgment upon them other than that rendered would plainly be unjust, there ought not to be a reversal on such a ground as that the answer was not in proper form technically.

APPEAL from Third Judicial District, Santa Clara County.

D. W. Herrington & E. Spencer for appellant; C. T. Ryland for respondent.

See People v. San Francisco & S. J. R. R. Co., 28 Cal. 254.

SAWYER, J.—Upon the views we take, it will be unnecessary to notice all the points discussed in the briefs. It clearly appears in the record and it was affirmatively shown by the plaintiff that no valid assessment had been made at the time this suit was instituted. When the suit was commenced, therefore, there was no delinquency on the part of the defendant, and no cause of action had accrued. It is unnecessary to determine whether, under the law subsequently passed, the assessment was afterward perfected, so that the tax became a valid charge, for, until it was perfected, there was no valid tax, and no cause of action against defendant existed.

The defense was available in some form: People v. Waterman, 31 Cal. 413. We will not now stop to inquire whether

it was technically made in the proper form, for, if not, the defendant would be entitled to correct the mistake if the case should go back for a new trial, and it is apparent that the judgment is in accordance with the legal rights of the parties. It would be useless to send the case back when the plaintiff could not possibly recover in the present action. Besides the defendant has since paid a sum satisfactory to the board of supervisors, and the litigation now seems to be in regard to the fees of the district attorney, which he must fail to recover in any event for the reason before stated.

Judgment affirmed.

We concur: Sanderson, J.; Currey, C. J.

I dissent: Rhodes, J.

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## DONNER v. PALMER (BRADLEY, Intervener).

No. 751; November 2, 1867.

**Judgment—Questions Determined.—A Decision of One Question** of law presented by stipulation does not imply a waiver of all other questions in the case, nor does the decision of that question imply that other questions that might have been determined upon the record as presented were in fact decided.

**Pleading—Insufficiency of Complaint—Waiver.**—The point that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur, but it may be made at any time.

**Intervention—Occasions for.—Under Section 659 of the Practice Act** a person is permitted to intervene: 1st. When he has an interest in the success of the plaintiff; 2d. When he has an interest in the success of the defendant; and 3d. When he has an interest against both.

**Intervention.—When One Tenant in Common Sues to Recover the Possession** of the premises, and the damages sustained by the ouster, and the rents and profits to which he is entitled, the case is not one where his cotenant can intervene, for the cotenant is not interested.

**Intervention — Ejectment.—Where the Ownership, as Claimed by the Plaintiff, is of Three Undivided Fourths,** and this is the subject matter of his ejectment suit, one who would intervene does not

show a right to do so by alleging that he is "the owner in fee simple and entitled to the possession of the undivided one-fourth part" of the premises, "being the one undivided one-fourth part of the said premises mentioned in the plaintiff's complaint; that is, the undivided one-third of the undivided three-fourths thereof, as mentioned therein."

**Ejectment—Rents and Damages.—The Gravamen of the Action of Ejectment** is the wrongful withholding of the possession of the premises from the plaintiff from the time of the alleged entry up to the commencement of the action; and the plaintiff, upon showing title, is entitled to recover the possession together with damages for the wrongful withholding of the possession, and the value of the rents and profits while the possession was so withheld.

**Intervention—Ejectment.—If One Seeking to Intervene in an Ejectment** suit does not allege, in his petition, that he had title before the commencement of the action the omission is fatal; and he does not cure it by alleging that he "is the owner and entitled to the possession," etc.

**Intervention — Ejectment.—It is Doubtful if One Tenant in Common** can, under the provisions of the statute, intervene in an action of ejectment brought by his cotenant; since tenants in common are such as hold by several and distinct titles, even though also by unity of possession, while a plaintiff in ejectment can recover only on the strength of his own title.

RHODES, J.—The first question is, What was determined by this court on the former appeal? At the first trial in the court below, the jury returned a verdict against the intervener, and the court having granted the intervener a new trial, the plaintiff appealed. The plaintiff and intervener had entered into a stipulation by which certain facts were admitted, and it was agreed "that it is the intention and object of the foregoing stipulation to submit to the court, as a question of law, the question of priority of the foregoing judgments, liens and attachments, and which of the parties acquired, under the sales herein mentioned, the interest of said John Yontz in the property sold as hereinbefore stated, and that either party may offer and give in evidence any documentary evidence they may see proper." The intervener stated in his brief on the former appeal that "the only point is, whether the taking out of the transcript of the judgment in the case of Cobb v. Yontz, in Santa Clara county, after the two years had expired, and filing it in San Francisco, created a lien upon the premises." Mr. Justice Crocker, in delivering

the opinion of the court, after reciting certain facts agreed to in the stipulation, said: "Under this state of the facts, the simple question is, Which of these two parties, the intervener or the plaintiff, has the better right and title to this interest of Yontz?" The court was of the opinion that the intervener had the better right and title to that interest, and accordingly affirmed the order granting the intervener's motion for a new trial. That was the matter, and the only matter, determined in the cause by this court, as between the plaintiff and intervener. No other point than the one above mentioned appears to have been made by either counsel, and none other was decided by the court. The question whether the petition of intervention stated facts sufficient to entitle the intervener to any relief, or whether it was a proper case for intervention, or whether he was entitled to judgment upon the evidence in the case, was not passed upon by the court. Nor were any of them necessarily involved in the point that was decided. A decision of one question of law presented by stipulation does not imply a waiver of all other questions in the case, nor does the decision of that question imply that other questions that might have been determined upon the record as presented were in fact decided. The ground that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur, but it may be taken at any time.

The affirmance of the order granting a new trial left the case in the same position in every respect in which it stood, upon the order being granted, except only that upon the facts stated in the stipulation it was determined that the Yontz title was in the intervener. There was nothing to preclude the plaintiff from raising the questions which were considered by the court below, and upon which the petition for intervention was dismissed.

Under section 659 of the Practice Act, a person is permitted to intervene: 1st. When he has an interest in the success of the plaintiff; 2d. When he has an interest in the success of the defendant; and 3d. When he has an interest against both the plaintiff and defendant. The interest must necessarily be an interest in the matter in litigation; and, as was said by Mr. Justice Field, in Horn v. Volcano etc. Co., 13 Cal. 69, 73 Am. Dec. 569: "The interest mentioned in the statute, which en-

titles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character, that the intervener will either gain or lose by the direct legal operation and effect of the judgment." If this doctrine is correct—and we are entirely satisfied with it—when one tenant in common sues to recover the possession of the premises, and the damages sustained by the ouster, and the rents and profits to which he is entitled, it is difficult to see how his cotenant can intervene, for he is interested neither in the title of the former, nor in the damages, rents or profits to which the former is entitled; nor will the latter gain or lose directly by the recovery of the former, for his right is the same, whatever may be the judgment. If the former recovers the possession, the latter has this indirect benefit—he is saved the necessity of a suit for its recovery.

In this case the intervener alleges that "he is the owner in fee simple and entitled to the possession of the undivided one-fourth part" of the premises, "being the one undivided one-fourth part of the said premises mentioned in the plaintiff's complaint; that is, the undivided one-third of the undivided three-fourths thereof, as mentioned therein"; and he insists that this shows a proper case for intervention, because he claims a part of the very title through which the plaintiff seeks to recover. This position is fallacious. The different undivided interests, so far as appears from the pleadings, have not a separate identity like the several quarters or other divisions of the lot itself. They are simply undivided portions of the whole title. The plaintiff does not allege that he is the owner of any particular undivided three-fourths, and it is impossible to see how the intervener can say that he is the owner of any one of those quarters, or of a part of each of them. Had the plaintiff sued for the whole, then the intervener's quarter must have constituted a part of that which was claimed by the plaintiff, and this for the mathematical reason that the whole of a thing includes all its parts. Nor has the intervener designated his quarter in such manner that it can be said to be any particular quarter. If he owns an undivided quarter, he is simply a tenant in common to that extent, and it is quite immaterial to him how much the plaintiff claims. The different interests have been derived from different persons, or from the same person at different times.

and in that manner may be distinguished for certain purposes, but nothing of the kind appears in the pleadings, and we must hold the allegation of the petition, that the intervener's one-quarter is one-third of the plaintiff's three-quarters, as immaterial and mere surplusage. The allegation amounts only to this, that the intervener is the owner, etc., of one undivided quarter of the premises.

The gravamen of the action of ejectment is the wrongful withholding of the possession of the premises from the plaintiff, from the time of the alleged entry up to the commencement of the action; and the plaintiff, upon showing title, is entitled to recover the possession, together with damages for the wrongful withholding of the possession, and the value of the rents and profits while the possession was so withheld. The intervener does not allege that he had title before the commencement of the action. The averment in the petition is that he "is the owner and entitled to the possession," etc., and it will not be presumed that he held the title on any day previous to the filing of the petition. If such was the case he could not possibly have been injured by the ouster of which the plaintiff complains. So far as the ouster, and the consequent claim of damages, and the rents and profits up to the time of the filing of the petition of intervention, are concerned, the intervener had no interest in the action. He not being entitled to the possession at the commencement of the action, and not being then nor since interested in the title held by the plaintiff—the title held by the plaintiff, and not that held by another person, being the basis of the plaintiff's recovery—the conclusion is inevitable that the intervener was not interested in the matter in litigation.

The intervener states that after he was entitled to the possession the defendants ousted him. That is a different cause of action from that stated by the plaintiff, and does not form any part of the matter in litigation between the plaintiff and the defendants. The intervener is not aided by this, for he is not authorized to introduce a new cause of action. We are of the opinion that the intervener has not stated facts sufficient to entitle him to intervene in the action.

It admits of serious doubt whether one tenant in common can, under the provisions of the statute, intervene in an action of ejectment, brought by his cotenant. Tenants in common

are such as hold by several and distinct titles, but by unity of possession. The several tenants in common cannot by any possibility hold the same title. Their several titles are portions of the same general title, but the title of each is entirely distinct. When one tenant in common commences an action of ejectment against a stranger, his title and not that of his cotenant, is drawn in issue, and if he recovers in the action, he recovers upon his own title. He could not recover upon that of his cotenant without abrogating the rule that has become a legal maxim in ejectment, that the plaintiff must recover upon the strength of his own title. Should an intervener be permitted to come in, he also must recover upon the strength of his own title; and to enable him to do so, he cannot rely upon the plaintiff's cause of action, but must introduce into the action a new matter of litigation—his own title. It requires no argument to show that he is not authorized to bring into the controversy a new cause of action. The Practice Act does not contemplate such a proceeding. The only theory upon which such a proceeding could be made plausible is the one adopted in this case. Suppose the plaintiff claims title to the one-half, and that the intervener claims one-half, and alleges that his half is the same half that the plaintiff sues for, and that the intervener proves his allegations; then the plaintiff of course fails, and the defendant must have judgment. The result must be the same that it would be had the defendant set up and shown outstanding title in a third person, in a case where there is no intervention. The intervener cannot recover when he shows that the plaintiff has no cause of action. If the intervener claims and proves title to only a part of the interest sued for by the plaintiff, the plaintiff must fail, and so must the action, for the part held by the intervener. If one cotenant can intervene, all may do the same; and they may successively claim a part or all of the plaintiff's asserted title, and after they have defeated the plaintiff, they may continue the contest among themselves. If an intervention is admissible when the defendant is a stranger, there is no good reason why the same may not be done when the defendant is a tenant in common. Although an ouster by a stranger is deemed in law an ouster of all the tenants in common, yet the ouster of each is as distinct as is the assault and battery committed upon each of several persons who have been injured by

the same act. The plaintiff counts upon the ouster of himself and not that of his fellow. Tenants in common may join in the action, but each must allege that he was ousted by the defendant.

The provisions of section 659 are general, and without any restriction to actions of a particular character; but the nature of the certain actions is such as to render an intervention wholly inadmissible; and in our opinion it would be no more allowable in an action of this character than in an action for an assault and battery, or a libel, or slander.

The court correctly held that the intervener was not entitled to intervene in this action.

Judgment affirmed.

We concur: Currey, C. J.; Sanderson, J.; Sawyer, J.

Justice Shafter, being disqualified, did not participate in the decision of this cause.

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## L. C. DODGE et al., Respondents, v. THE MARIPOSA CO., Appellant.

No. 1297; November 29, 1867.

**Upon an Account Stated a Written Promise by the Debtor to Pay** at request in gold coin can be enforced, even though before gold could not have been demanded, the amount due being a sufficient consideration.

**Corporation—Service of Process.—The Statute Which Provides** that process against a corporation may be served upon "an agent," in this state, of such corporation, is satisfied by a return making it appear that the service was made upon "the managing agent of the defendant."

APPEAL from Fifteenth Judicial District, San Francisco County.

Sharp for respondents; J. B. Felton for appellant.

SAWYER, J.—We think the complaint shows a case that justifies a judgment for coin. It avers that upon an account-

ing had between plaintiff and defendants, "the defendant was found to be in arrear and indebted to said plaintiff in the sum of fifty-nine thousand four hundred and ninety-four 50/100 dollars in United States gold coin; and being so found in arrear and indebted to said plaintiff, the defendant, through its lawfully authorized agent, promised in writing to pay the same, when requested, in said gold coin." Here is an averment of a promise in writing to pay, in coin, a sum admitted, on an accounting, to be due in coin. The amount being due is a sufficient consideration, and the written promise upon the consideration is "a contract or obligation in writing for the direct payment of money made payable in a specific kind of money," within the meaning of section 200 of the Practice Act. The default admits the averment. The prayer of the complaint demands a judgment payable in United States gold coin, and the summons notifies the defendant that, upon failure to answer, judgment will be taken payable in United States gold coin, so that the relief granted was justified by the allegations of the complaint, and does not exceed that demanded in the prayer and specified in the summons. We think the return discloses a service; it states the party upon whom the service was made to be the "managing agent of the defendant." The "managing agent" must be "an agent," and, in the case of a foreign corporation, the summons may be served on "an agent": Practice Act, sec. 29. Regarding the defendant either as a foreign or domestic corporation, the service is good. The defendant seems, from the averments in regard to its incorporation, to have been incorporated both under the laws of New York and California. This fact will not enable the defendant to escape a judgment. There is nothing in Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286 [17 L. Ed. 470], indicating that a judgment cannot be entered against a body claiming to be incorporated under the laws of two states. We find no error in the record.

Judgment affirmed.

We concur: Shafter, J.; Currey, C. J.; Sanderson, J.

PIERRE DESORMAUX, Appellant, v. CHARLES T. MEADER, Respondent.

No. 1297; November 30, 1867.

**A Contract for Services as Superintendent of a "Copper-smelting Establishment,"** whereby plaintiff was to receive from defendant six thousand dollars a year salary and fifty cents in addition for every ton of ore smelted, would not, unless so expressed specifically, bind the defendant to have the "establishment" in constant activity in order to swell to the utmost the amount per ton so to be paid.

APPEAL from Fifth Judicial District, San Joaquin County.

This action was to recover damages for divers alleged breaches of a written contract, dated March 31, 1864, signed by the parties and for the recovery of wages for services under a verbal contract made August 26, 1865. Under the written contract Desormaux was to "take charge of, direct and superintend, for and during the period of twelve months, a certain copper smelting establishment to be erected by" Meader "under the direction of" Desormaux. The consideration for these services was the payment to Desormaux of "the sum of six thousand dollars per year in gold coin of the United States, said salary to continue for one year only, and the additional sum of fifty cents" per ton, etc., as quoted in the decision. The verbal agreement was alleged to have been made after the rendering of the first year's service, and involved the promising by Meader to pay the six thousand dollars then having become due to Desormaux as wages.

At the trial the plaintiff offered to prove, and as points for the court's charge to the jury, twenty distinct propositions, some involving details of his professional career, as tending to show his efficiency and the inducements for the defendant's employing him; one going to the fact of his being a Frenchman, unfamiliar with the English tongue, and dependent on an interpreter, wherefore his having an imperfect understanding of what he had signed; some going to what ought to be done so as to push on the work contemplated by the contract; some going to show improvident purchases of structural material by Meader in that connection so that he had stood in his

own light; some going to prove outside statements, made as alleged by Meader, laudatory of what Desormaux had done for him and also indicating his intentions in the matter of the work proposed, etc.; all of which propositions the defendant objected to, the trial court sustaining his objections on the grounds, 1st, that the terms of the written contract sued upon could not be varied, explained or added to by parol, and, 2d, that it was for the court only, and not the jury, to construe the contract.

J. B. Hall and C. Dorsey for appellant; M. G. Cobb and D. W. Perley for respondent.

SAWYER, J.—Clearly under the terms of the contract in suit the defendant was not bound to run the "copper-smelting establishment," to be erected under it, to the full extent of its capacity for a period of five years, or for any other time. In addition to the six thousand dollars per annum salary for one year, the defendant was to pay the plaintiff "fifty cents for each and every ton of ore smelted in the above establishment during the period of five years from the time that the work of smelting is commenced within said establishment, whether it shall remain under the superintendence of the party of the second part or not." While this covenant required defendant to pay fifty cents per ton for every ton smelted during the five years, it did not require him by express terms or by any reasonable construction to run the establishment constantly, or during the entire term, or any specified portion of the time. The enterprise was one of great hazard. If profitable, the profits were doubtless supposed to be sufficient inducement to defendant to carry on the business after going to the expense of erecting the necessary furnaces and machinery. If defendant was willing to risk his capital, it may well be supposed that plaintiff might risk the chance of further profits, after getting a certain and liberal salary of six thousand dollars per annum for his services, without requiring defendant to obligate himself to work the establishment for the sole purpose of giving plaintiff fifty cents per ton for the rock smelted, whether he obtained any profit or not. However this may be, no such hard bargain for the defendant is expressed in the contract sued on, or

can reasonably be implied from the terms. This is the principal question in the case. The minor questions arise out of the rejection of the evidence and on the instructions given and refused. We have carefully examined the points raised, and we think no error is shown in the rulings of which complaint is made.

Judgment affirmed.

We concur: Shafter, J.; Sanderson, J.; Currey, C. J.

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JOHN FOSTER, Appellant, v. ANTONIO F. CORONEL et al., Respondents.

No. 1409; December 24, 1867.

**Judgment—Collateral Attack.—A Judgment is Good Until Reversed,** and therefore is not to be questioned for the first time in an action on an alleged wrongful sale in execution of it.

**Execution—Wrongful Sale—Remedy.—If by the Misconduct of** the officer property levied upon was sold at a sacrifice, the owner's remedy is against the officer for damages, not against the purchaser to recover the property.

APPEAL from First Judicial District, Los Angeles County.

——— & Chapman for appellant; V. E. & C. W. Howard and Morrison & King for respondents.

SAWYER, J.—We find no error in the record. The judgment is valid, at least until reversed. It is by no means certain that it would be reversed on appeal. The evidence excluded was inadmissible in this action. The judgment and execution authorized a sale of the property. If the officer, by his misconduct, induced a sale of the property for less than it would otherwise have brought, the remedy must be an action for damages, resulting from his acts, and not an action to recover the property, or its value.

Judgment affirmed.

We concur: Currey, C. J.; Rhodes, J.

SETH H. WETHERBEE, Appellant, v. H. L. DAVIS et al., Respondents.

No. 1470; December 24, 1867.

**Appeal—Effect of Absence of Statement.**—One appealing from a judgment may bring his appeal on the judgment-roll with or without a statement as he may desire, but if without then nothing outside of the judgment-roll will be considered.

**Appeal—Judgment-roll.—Exceptions Taken at the Trial** and settled when taken, as prescribed by sections 188–190 of the Practice Act, are annexed to and become part of the judgment-roll, and on appeal on the judgment-roll will be considered.

**Appeal—Absence of Statement.—No Exception, Save Those Annexed** to the judgment-roll, will be considered on appeal, unless there is a statement in the preparation of which both parties were heard.

**Appeal—Necessity of Statement.—The Only Mode by Which an Order** of court, not made upon affidavits alone, can be brought up on appeal, so as to merit consideration, is by a statement made subsequently to the trial, both parties participating in and settling it.

**Appeal—Statement, What Does not Dispense With.**—Without regard to whether a stipulation to the effect that the foregoing so many pages constitute, etc., enumerating essential papers, precludes a respondent from denying the correctness of a bill of exceptions, etc., so referred to, such a stipulation does not dispense with the statement on appeal required by statute.

APPEAL from Fourth Judicial District, San Francisco County.

John Reynolds for appellant; R. H. Lloyd and S. W. Holladay for respondents.

SAWYER, J.—This is an appeal from an order denying a motion for an order requiring the sheriff to execute a writ of restitution issued upon a judgment for the possession of land.

The respondents object that the order of the district court cannot be reviewed on the record presented. And we are compelled to say again that the methods prescribed by the Practice Act for presenting the order for review have not been pursued. The record may, and it may not, present the entire merits of the case, so that the respondent cannot be

prejudiced. But, under the provisions of the statute, we cannot know that it does.

The statute authorizes appeals from final judgments, and appeals from various orders. And there are several modes of making a record for the purpose of presenting the action of the court below for review, each mode being adapted to the peculiar exigencies of a particular class of cases, and calculated to enable each party to introduce into the record in a direct, simple and authentic manner, all that is necessary to present his view, without unnecessarily encumbering it. If we could only persuade ourselves to forget old terms and old modes of procedure, which, under our system, have become obsolete, and confine our attention to the Practice Act itself, it does seem as though we should encounter less difficulty. The abandonment of obsolete terms, which suggest obsolete modes of procedure, and the adoption of the nomenclature of the Practice Act would, doubtless, in some degree, tend to induce correct views of its provisions.

Firstly, as to appeals from the judgment. On these appeals there may, or may not, be a statement annexed to the judgment-roll, as the parties may desire. The judgment-roll itself is a record for an appeal, and there may be no occasion for anything further to present the question raised. But it has been settled from an early day that on appeal from a judgment, without a statement, nothing is brought up, or is a part of the record on appeal, except the judgment-roll, and no question, arising outside of the roll, can be considered. If any further record is required, it must be made in the form of a statement. Now, however, exceptions may be taken and settled, at the trial, in the mode prescribed by sections 188, 189 and 190: See More v. Del Valle, 28 Cal. 174. These, under section 203, are annexed to, and form a part of the judgment-roll, and, therefore, constitute a part of the record on appeal from the judgment, on the judgment-roll alone. They are the only exceptions or bills of exceptions known to our Practice Act, except so far as a ruling and exception to it, presented by a statement made in the mode prescribed by that act, may be regarded as a bill of exceptions: Quivey v. Gambert, 32 Cal. 304. The reasons upon which this restriction of the cases for exceptions and for the mode prescribed for taking and settling them seem obvious enough.

At the trial both parties are present, and in settling the exceptions can be heard. Each party can see that everything necessary to a presentation of the entire merits on both sides is introduced. "The objection shall be stated, with so much of the evidence, or other matter, as is necessary to explain it, but no more": Sec. 190. The parties have the same opportunity for securing a correct presentation of the exception as is afforded in settling a statement. The only other mode of making up anything like or answering to a bill of exceptions is by a statement, proposed in the manner prescribed by the Practice Act, in the preparation of which both parties are also heard. The policy of the act is, that whenever there is a possibility that a partial record for presenting a point may be made, both parties shall have an opportunity to take part in settling it. And the two modes prescribed, one by settling the exception during the progress of the trial, in the presence of both parties, and annexing it to the judgment-roll, the other by a subsequent statement in the mode designated, afford an orderly and convenient mode of accomplishing that end. The latter mode is the one, and the only one, designated in all cases on appeal from an order, not made upon affidavits alone: Sec. 343, and the five preceding sections.

Secondly, as to appeals from orders. Proceedings resulting in order are not ordinarily enrolled, and there is, consequently, no technical record. There is no record for an appeal, except one made for the purpose in the mode prescribed. When an appeal is taken from an order made upon affidavits alone, the affidavits are filed, and, in making a record for the appeal, are attached to the order, with the proper identification. In such cases there cannot well be a partial record, and the statute requires nothing more. But, when made upon other evidence, either alone, or in connection with affidavits, much of it often consists of documents not filed—judgment-rolls and files in other cases, which are not, and cannot be made, a part of the files in the case heard. Questions of admissibility of evidence, etc., may arise. A convenient way of making so much of these as is necessary to present the legal points contested a part of the record on appeal is by statement, and that method is, accordingly, adopted, and no other is provided: Haggin v. Clark, 28 Cal. 162. See, also, Abbott v. Douglass, 28 Cal. 299; Hutton v.

Reed, 25 Cal. 479; Harper v. Minor, 27 Cal. 107, for the reasons for adopting this mode of making statements.

Certain grounds for new trial are required to be presented by affidavit, others by a statement: Sec. 194. The pleadings, depositions, documentary evidence on file and minutes of the court may be read on the hearing of the motion. The record on appeal from the order, granting or denying a new trial, consists of the affidavits and statement, upon which the motion was made, in connection with such pleadings, depositions and minutes, as were read and referred to, identified by the certificate of the judge. These several modes mentioned are all the methods provided for making a record on appeal in the ordinary proceedings, authorized by the Practice Act. Each form is peculiarly adapted to the preparation, in a simple and direct mode, of an authentic record for the particular class of cases for which it is provided, which shall fairly present the exception taken, and everything necessary to illustrate it.

And we think these several modes convenient and certain, and fully adequate to all the exigencies of proceedings on appeal. Other modes, especially when wholly or in part ex parte, are liable to, and often do, result in an imperfect or partial record. The statute has provided a uniform mode of procedure for each class of proceedings, and we are not authorized to recognize any other; besides, it is extremely desirable that a uniform practice should be enforced. The present record is not in accordance with the method provided for the class of cases to which it belongs, or with any of the methods prescribed.

Although the bill of exceptions contains matter proper to be embodied in a properly prepared statement, it is not pretended that there is a statement on appeal. There are certain affidavits and exhibits, followed by what is termed a bill of exceptions, signed and sealed by the judge. The bill of exceptions must, necessarily, have been made up, signed and sealed, at some time subsequent to the making of the order from which the appeal is taken. It was probably made ex parte. At all events, nothing to the contrary appears; and as there is no provision for such a document, there is none requiring it to be submitted to the other party. It recites that, upon the hearing of the order to show cause, certain

parties appeared; that certain affidavits in the transcript, a certain deed and the judgment-rolls in two certain other cases, not in the transcript, were read; that certain facts appeared therefrom; that, the matter having been submitted, the court made an order, discharging the order to show cause, and refusing to direct the sheriff to proceed with the execution of the writ issued in this cause, and that the plaintiff excepted to the decision. As we have before seen, there is nothing in our Practice Act authorizing a record on appeal to be made in this mode. The respondent had no part in it. The order was not made on affidavits alone, but, in part, upon other evidence, as shown by the bill of exceptions, so called, much of which is not in the record.

The questions may be fairly presented by the bill of exceptions. Yet portions of the record necessary to illustrate the respondent's view may be omitted. At all events, the exception, under the Practice Act, should have been presented in a statement, in the settlement of which the respondent was entitled to participate. We are not authorized to recognize a record not made in the mode prescribed, in the settlement of which the respondent had no opportunity to participate. The objection taken is not merely technical, but is substantial. Respondent has been deprived of a right which the law gives him. If we have at any time considered points presented by what was designated a bill of exceptions instead of a statement, as we have in one instance, at least (Warden v. Mendocino County, 32 Cal. 657), it was because no objection was made on that ground. We ought, perhaps, to apologize for repeating in this case much that has so often been said before in other classes of appeals, but, as the mistakes continue to be repeated, we thought it desirable to present, in one connected view, the mode of proceeding in each class of appeals.

It is claimed, however, that the stipulation that the foregoing twenty-one pages constitute the transcript on appeal from the order and contain true, full and correct copies of the affidavits referred to in the bill of exceptions, judgment, order, notice, bill of exceptions filed in the case, etc., precludes respondents from denying the correctness or sufficiency of the bill of exceptions, etc.

We think not. The stipulation is but a substitute for the clerk's certificate to the correctness of the transcript. It

simply shows that this is a transcript of such record of the proceedings, as has been, in fact, made in the court below—such as it really is. The record itself may be sufficient, or insufficient, under the law, to authorize the court to review the action of the court below. The stipulation in this case shows what the record, in fact, is—nothing more. It might, undoubtedly, have gone further, but it has not done so and manifestly was not designed to do more, than authenticate the transcript as a true copy of the record below. And that is the extent to which such stipulations usually go. When attorneys design to stipulate for anything further, they will, doubtless, do so in terms not to be misunderstood.

We are of the opinion that the order cannot be disturbed on this record. It is, therefore, affirmed.

We concur: Rhodes, J.; Sanderson, J.

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## JOHN KELLY, Appellant, v. JOHN B. FRISBIE, Respondent.

No. 1493; December 24, 1867.

**Evidence—Parol to Vary Indorsement.**—Oral testimony is not admissible to vary the terms of a written agreement, or of an indorsement on the instrument extending the time of payment of money becoming due under the agreement, so as to make such agreement or indorsement cover a promissory note in no manner referred to in either.

APPEAL from Seventh Judicial District, Solano County.

This was an action on a promissory note and to enforce an alleged guaranty. One Vallejo had given to the plaintiff his note for three thousand dollars, with interest at ten per cent per annum, dated October 1, 1859, and payable in two years; the note was not paid at maturity. The complaint, after stating in effect thus much, went on to allege that besides this indebtedness Vallejo owed the plaintiff other moneys, and, without breaking the verbal connection, the complaint continued that the defendant, in order to obtain

for Vallejo further time for payment, executed the following paper:

"In consideration of the agreement of John Kelly to extend the time of payment of the amount due from Platou W. G. Vallejo to said Kelly for one year from this date I agree to pay at one year from this date such amount, whatever it may be, with one and a half per cent interest per month thereon from this date until paid.

"October 1st, 1860. (Signed) JOHN B. FRISBIE."

There was, the next year, a further extension indorsed on the paper, thus:

"The within agreement has been extended one year from date.

"Vallejo Oct. 1, 1861.

(Signed) JOHN B. FRISBIE.
"JOHN KELLY."

M. A. Wheaton for appellant; A. M. Currier for respondent.

SAWYER, J.—The agreement of October 1, 1860, does not include the three thousand dollar note of Vallejo, dated October 1, 1859. The second agreement of Frisbie of October 1, 1861, indorsed upon, and extending the time for, the performance of the said agreement of October 1, 1861, is, by its terms, limited to that agreement. Parol evidence would be inadmissible to show that it included the note. The complaint, therefore, does not state a cause of action, and the demurrer was properly sustained.

Judgment affirmed.

We concur: Rhodes, J.; Currey, C. J.; Sanderson, J.

GEORGE SAYER, Respondent, v. PATRICK DONAHUE et al., Appellants.

No. 1534; January 11, 1868.

**Mining Partnership.—A Sale by a Constable for Mining Assessments,** under the act "concerning partnerships for mining purposes" (Laws 1866, page 828), is not valid unless the owner of the stock was notified of the assessment as required by sections 2 and 4 of the act.

APPEAL from Tenth Judicial District, Sierra County.

This was an action of ejectment, the property involved being an undivided interest in certain mining claims. It was virtually admitted that plaintiff should recover unless his title to possession had been devested by a constable's conveyance alleged as made "under and by virtue of an act of the legislature of the state of California, entitled An act concerning partnerships for mining purposes, passed April 2, 1866." Patrick Donahue testified, for the defendant, that prior to the constable's sale he signed, and served upon the plaintiff, a written notice of assessment in these words:

"Eureka, September 4th, 1866.

"George Sayer, Esq., Sir:

"You are hereby notified that on the 4th day of August, 1866, at a meeting of the stockholders therein, the Shamrock Mining Company, whose works are at Fir Cap mountain, Fir Cap Mining District, Sierra County, State of California, said company being a consolidation of the Richardson and Buffalo Companies, an assessment was levied on all the shareholders therein, to the amount of $1,181.25. And there is now due from you on your Buffalo interest the sum of $34.74 and on your Richardson interest $61.25. And you are further notified that unless you pay the above sum to the undersigned, at Eureka, Sierra County, within ten days from this date, that your interest in said claim, or as much thereof as may be necessary therefor, will be sold to pay said assessments.

"PATRICK DONAHUE,
"Secretary."

The witness further testified that at the time of the signing and serving he was the secretary and manager of the Shamrock Mining Company, that said company had been formed by the consolidating of the Buffalo and the Richardson mining companies, to which consolidation the plaintiff had never consented; further, that the plaintiff had refused to be a member of the Shamrock company or to recognize the consolidation. On cross-examination he admitted he did not know if, in anticipation of the meeting at which the assessment was levied, the plaintiff had been notified that such meeting would be held. The plaintiff testified that he had received no such notice, he testified also that he had never disposed of his interest in either the Richardson or the Buffalo claims, that he still owned them, and that he had last worked on the claims in June, 1865.

Van Cleif & Cowder, and S. B. Davidson for respondent; T. J. Bowers for appellants.

SAWYER, C. J.—We have examined the transcript and the grounds specified in the statement on motion for new trial, and it is perfectly plain that there is no error in them. The defendants claim to have acquired plaintiff's title through a sale by a constable for assessments, attempted to be made under the provisions of the act of April 2, 1866, "concerning partnerships for mining purposes": Laws 1866, p. 828.

If it be conceded that the plaintiff was a member of the "Shamrock Mining Company" and subject to be assessed, the evidence is insufficient to show that he was notified in the manner required by sections 2 and 4, or either of them. And the sale was void on that ground.

There is no evidence to show a forfeiture, or abandonment. The case is so plain that no argument can help the appellants; and to give time would be to delay the case to no purpose, and to the injury of respondents.

Judgment affirmed.

We concur: Sanderson, J.; Rhodes, J.; Crockett, J.; Sprague, J.

PEOPLE, Appellant, v. JOHN PARROTT and Certain Real Estate, Respondent.

No. 1508; January 11, 1868.

**Appeal—Specification of Error.—On an Appeal from a Judgment Only,** a specification that "the evidence did not justify or warrant the judgment" is insufficient.

**Appeal — Review of Evidence and Findings.—**The appellate court cannot review the evidence or findings of fact on an appeal from the judgment.

**Appeal—Insufficiency of Statement.—No Question as to the Effect** of a document introduced in evidence is presented by a statement that fails to show that at the trial such introduction was objected to, or what was the trial court's ruling, if any, in that connection.

**Appeal.—A Statement That Contains the Evidence but No Ruling** excepted to on any part of it is insufficient on appeal from the judgment only.

APPEAL from Tenth Judicial District, Colusa County.

D. Shepardson for appellant; G. N. Sweezy for respondent.

SAWYER, C. J.—The appeal is from the judgment, and the document called a statement on appeal presents no question in any form which entitles us to review it on an appeal from the judgment.

The specification that "the evidence did not justify or warrant the judgment," is insufficient: Hutton v. Reed, 25 Cal. 490. Besides, it has been so long settled, and so often stated, that we cannot review the evidence or findings of fact on an appeal from the judgment, that there ought not to be any occasion to repeat it. A motion for new trial is the only medium prescribed for presenting for review the matters complained of in this case: Allen v. Fennon, 27 Cal. 68; Green v. Butler, 26 Cal. 595.

The question as to the effect of the former adjudication is not presented by the statement. It does not appear that the appellant objected to its introduction in evidence, or that the court made any ruling whatsoever in respect to it, or gave any effect to the judgment when introduced. We are not in-

formed as to what view the court took in respect to it., No ruling in the progress of the trial excepted to by the appellant is found in the statement on appeal. The evidence, only, is presented, and on an appeal from the judgment only. We seem to be expected to ascertain the facts from the evidence, and then determine whether the facts so to be found by us are sufficient to justify the judgment. The statement is wholly insufficient, and the subject matter, if otherwise sufficient, is only appropriate to a statement on motion for new trial. The motion to strike out must be granted.

This leaves only the pleadings and judgment, and they disclose no error.

Motion to strike out granted, and judgment affirmed.

We concur: Sanderson, J.; Crockett, J.; Rhodes, J.; Sprague, J.

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MARGARET HAWKINS, Appellant, v. THOMAS KINGSTON, Respondent.

No. 1318; January 17, 1868.

**Pleading.—To Interpose a Meaningless Demurrer is the Same as to** interpose none at all.

**Vendor and Vendee—Possession Before Payment.**—The grantee under a conveyance meant to take effect only on payment of the consideration takes no right of possession in the meantime.

**Witness.—A Defendant Called to the Stand by the Plaintiff's Counsel** to testify as to an instrument may be cross-examined by his own counsel and therein made to produce another instrument that modifies the first.

**Trial.—A Question as to the Order of Proof at the Trial** is one solely within the discretion of the trial court.

APPEAL from Fourteenth Judicial District, Placer County.

This was an action of ejectment. The plaintiff filed a demurrer to the answer expressed as follows: "Now comes plaintiff above named, by her attorney Jo Hamilton, and demurs to defendant's answer filed in said court, and as

grounds of demurrer she avers that said answer, even if taken as true, does not state facts constituting a defense. And for special grounds of demurrer plaintiff demurs to the whole of said answer, except the denials contained in said answer, and as grounds of demurrer, plaintiff avers that said answer, except the denials thereof, is irrelevant, impertinent and not responsive to the averments in the complaint. And for further grounds of special demurrer to said answer, plaintiff demurs to all of said answer except the said denial thereof, because the same is ambiguous, uncertain and unintelligible in this, that the same does not, so far as the same appears, have any relevancy to said suit."

The plaintiff's right to the possession rested on a conveyance from one Kneeland, but all the right or interest this person ever had in the property was derived through a paper, marked at the trial "Exhibit A," bearing these words:

"Know all men by these presents that for and in consideration of Five Hundred Dollars to me in hand paid, the receipt whereof is hereby acknowledged, I do bargain and sell and do by these presents deliver to John Kneeland, his heirs or assigns forever, one undivided half of the land or ranch known as the Kingston ranch, being same bought by him of Combs, Jordan and others. I also by these presents sell and deliver the following personal property to wit: Undivided half of nine head of cows, one heifer, nine pigs, one mare and colt, one bull, one dozen chickens and turkeys, more or less, one wagon and harness, with all other property on the place; signed, sealed and delivered in presence of, this fourth day of May, 1865, Illinoistown.

(Signed) "THOMAS KINGSTON."

At the trial the plaintiff called the defendant to the stand to prove this instrument, and on cross-examination he was allowed, over the plaintiff's objection, to testify that contemporaneous with this instrument was another instrument, executed by Kneeland, which was then produced and marked "Exhibit B." It was in these words:

"$785. For value received, I promise to pay Thomas Kingston or his order, Seven Hundred and Eighty-five Dollars for one-half of ranch and stock.

"Illinoistown, May 4th, 1865.

"JOHN KNEELAND."

The witness testified that the two instruments were intended to be parts of the same transaction and that the money had never been paid or tendered.

Jo. Hamilton and C. R. Tuttle, for the appellant; Hale & Fellory, for the respondent.

SAWYER, C. J.—The demurrer to the answer was properly overruled. We are satisfied that the exhibits "A" and "B," under the circumstances shown, should be read together as parts of one agreement. They were parts of, and together constituted, one transaction. Thus considered, the payment of the purchase money and taking possession were to be concurrent acts. The substance of the contract, to be gathered from the several instruments taken together, is, that Kingston conveys one-half of the ranch and stock to Kneeland, but possession is not to be taken till payment of the purchase money. The payment of the purchase money and taking possession being concurrent and dependent acts, the one was not entitled to demand possession without, at the same time, paying, or tendering the purchase money; nor the other to demand the purchase money, without, at the same time, surrendering, or offering to surrender, the possession. The case is fully within the principle of Hill v. Grigsby, decided at the last term. The court instructed the jury in accordance with this view, and we think there was no error in the rulings upon the instructions.

We think there was no error in allowing defendant to examine, as to Exhibit "B," plaintiff's witness, called to prove the execution of Exhibit "A." The subject matter is so closely related as to form parts of the same transaction. It is, at worst, only a question as to order of proof, and this is regulated very much by the discretion of the judge. Nor was there any error on the ground that Exhibit "B" is unstamped. The plaintiff had given in evidence a part of the agreement, also unstamped, and we think the defendant was entitled to show the whole. Besides, if there was error, the plaintiff cured it in a subsequent step of the proceedings, by himself introducing the same papers in evidence.

Judgment affirmed.

We concur: Rhodes, J.; Sanderson, J.; Sprague, J.; Crockett, J.

## PEOPLE, Respondent, v. RICHARD THOMPSON, Appellant.

No. 1433; March 6, 1868.

**Homicide—Evidence of Relations Between Defendant and Deceased.**—On a trial for murder it is not error to admit testimony bearing upon the relations between the defendant and the deceased, even though at the time of the offer all the testimony connecting the defendant with the homicide may not yet have been put in.

**Instructions.—A Criticism upon a Passage** of the court's charge, selected from the whole, has no force when the entire instruction, taken together, is plainly not subject to the criticism.

**Instructions—Review on Appeal.—An Objection to Any Point** in the judge's charge to the jury must have been excepted to at the trial in order to be given consideration on appeal.

APPEAL from Second Judicial District, Lassen County.

Attorney General for respondent; Ward & Buckbel and J. Lambert for appellant.

SAWYER, C. J.—The court does not appear to us to have erred in refusing to allow the challenge taken to the jurors Doyle and Hicks. There can be no doubt that the testimony of De Forrest and Huntington, as to the relations between the defendant and deceased previous to the homicide, was properly admitted. True, at that time, all the testimony connecting defendant with the homicide had not been introduced, but there was enough to render the evidence admissible. If there had not been sufficient at that stage of the proceedings, the evidence subsequently introduced was ample, and it could only be a question as to the order of proof. So long as it was finally admissible, the order in which it came in could, in this instance, at least, make no possible difference.

There is no force in the criticism, made under appellant's fifth point, upon a passage in the charge of the court. The law in the whole charge, bearing on this point, was clearly presented to the jury, and it is scarcely possible that it could have been misunderstood. The entire law necessary to be stated could not be embraced in a single sentence, and the court did not attempt it.

The defendant has nothing of which he can justly complain in that portion of the charge referring to drunkenness. Besides, we cannot find that there was any exception taken to this or any other portion of the charge given by the court.

The tenth instruction asked by defendant is clearly not law, and there was no error in refusing it. We find nothing in the record, of which the defendant can justly complain.

The judgment is affirmed with directions to the district judge to appoint a day for carrying it into execution.

We concur: Rhodes, J.; Crockett, J.; Sanderson, J.; Sprague, J.

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## CHARLES S. LORD, Appellant, v. ELIZABETH H. LORD, Respondent.

No. 1485; April 3, 1868.

**Appeal—Order for New Trial.—Appellate Courts will Set Aside** an order for a new trial in those cases only where the order has been clearly erroneous.

**New Trial—Testimony Reported by Referee.**—An order for a new trial after findings based on testimony reported by a referee, where, therefore, the court has not seen the witnesses and heard them testify, is not to be deemed as granted through the court's exceeding the bounds of sound judicial discretion.

**Divorce—Cruelty—New Trial.—In a Suit for Divorce** where there has been imputed to the defendant extreme cruelty, in considering a motion for a new trial the court is justified in being influenced by the thought that through the findings from the testimony at the trial the defendant's character may suffer irreparable injury of a most painful kind.

**Divorce—Cruelty—What Constitutes.**—It would be difficult, if not impossible, to state in advance what facts, lying near the borders of legal cruelty, would fill the definition of the term.

APPEAL from Twelfth Judicial District, San Francisco County.

McRae & Rhodes for appellant; A. Williams for respondent.

SAWYER, C. J.—This is an action by the husband for a divorce. The ground relied on is extreme cruelty. The court, upon the testimony reported by the referee, found the facts for the plaintiff, and rendered a judgment accordingly. After a review of the evidence on a motion for new trial, based mainly on the ground that the evidence was insufficient to establish the charge of extreme cruelty, the court below granted a new trial. Plaintiff appeals from the order.

Appellate courts will only set aside an order granting a new trial, when it is very clearly erroneous. We cannot say that the order now under consideration is clearly erroneous. The case is a peculiar one. The material testimony was nearly all introduced on the part of the plaintiff, and it is not very clear that it establishes a case of extreme cruelty, as that term is used in the law; nor is it entirely clear that it does not. Had the testimony been taken before the judge of the district court, and had he, after reviewing the evidence, been satisfied with the finding and denied a new trial, we probably should not have disturbed the order. But the district judge was not satisfied with the finding. He had not the advantage of seeing the witnesses. Had the testimony been taken in his presence, he would, doubtless, have been able to arrive at a more satisfactory conclusion. In a case lying so near the borders, and one of so much delicacy and difficulty, and of so great importance, the court was, doubtless, of the opinion that the ends of justice demanded a further, and in some particulars more full, investigation of the facts. In granting a new trial, under the circumstances, we do not think the court below exceeded the bounds of a sound judicial discretion. The testimony is not entirely satisfactory, and should the former finding be allowed to stand, an irreparable injury of a most painful character might be inflicted on the defendant, while the plaintiff, if he really has a sufficient cause of action, will still have an opportunity to establish it on another trial. We do not deem it necessary, or proper, now, to enter into a discussion as to what facts constitute extreme cruelty. It would be difficult, if not impossible, to state in advance what facts lying near the borders of legal cruelty would fill the definition of the term. The question has been much considered, and a lucid synopsis of the discussions will be found in chapter 37 of

the last edition of Bishop on Marriage and Divorce. While it may not be easy to announce in advance what precise circumstances it will be necessary to show, to entitle the plaintiff to a judgment, when the facts of this particular case are once fully and satisfactorily ascertained, it will not be difficult, we apprehend, in the light of the numerous authorities upon the subject, for the learned judge of the district court, without further discussion by us, to correctly determine whether or not they constitute extreme cruelty, within the legal meaning of the term.

We think the order granting a new trial should be affirmed, and it is so ordered.

We concur: Rhodes, J.; Sanderson, J.; Sprague, J.; Crockett, J.

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## HENRY A. HUBER, Respondent, v. JEREMIAH CLARKE et al., Appellants.

No. 1468; April 15, 1868.

**Parties—Ordering in New.—Where Complete Equity** cannot be done to all parties before the court without the presence of other parties, the court will order these others to be brought in or dismiss the suit, the plaintiff not consenting to their being brought in, even though the point of defect of parties may not have been raised by the defendant by demurrer or answer.

**Reformation of Deed—Readiness of Plaintiff to Do Equity.**—If by mistake, as averred in the complaint, a deed through which the defendant claims included land not intended, and excluded land intended, to be conveyed, and so likewise the deed through which the plaintiff claims, wherefore the latter asks for a rectification of his deed by the defendant, while so asking the plaintiff must aver that he is ready and willing on his part to rectify the defendant's deed.

**Reformation of Deed.—The Grantee of Land is Entitled to a Deed Precise** and accurate in its terms, and, although the uncertainty be such as a court of law is able to overcome by resort to the technical rules of construction, equity will not deny relief in a case before it.

**Reformation of Deed—Extent of Relief—Awarding Possession.** Under the rule that a court of equity will not deal with a case piece-

meal, when the case is one principally for the rectification of a deed, the court may decree as thus prayed, and at the same time decree, if it is asked, possession; and this is so particularly where, as in California, the jurisdictions of law and equity are blended.

APPEAL from Third Judicial District, Santa Clara County.

W. & S. Patterson, for respondent; Jeremiah Clarke in pro. per.

See Clarke v. Huber, 25 Cal. 593, 20 Cal. 196.

SANDERSON, J.—If we regard the objection to the complaint, on the ground that the Kochs are not made parties, as falling within the provisions of the fortieth section of the Practice Act, in relation to grounds of demurrer, we should be compelled to hold that it was waived by the abandonment of the demurrer. But we do not regard the objection as constituting a ground of demurrer merely. It goes to the power of the court to grant any relief in the absence of the Kochs, and falls directly within the provisions of the seventeenth section, which provides that when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in. Courts will not require equity at the hands of a party without, at the same time, taking care that he shall also receive equity. Hence, if complete equity cannot be done to all the parties before the court, without the presence of other parties, the court will order them to be brought in, or dismiss the action if the plaintiff declines to bring them in, notwithstanding the defendant may not have raised the objection by demurrer or answer: Van Epps v. Van Deusen, 4 Paige, 75, 76; Davis v. Mayor of New York, 2 Duer, 663; State v. Mayor of New York, 3 Duer, 121; Shaver v. Brainard, 29 Barb. 25; Perkins v. Church, 31 Barb. 84. We are, therefore, properly called upon, as we consider, to determine whether the Kochs are necessary parties to a complete determination of the present controversy.

1. The plaintiff claims that, by mistake, the deed from Robles to the Kochs includes land not intended to be conveyed, and omits land which was intended to be conveyed,

and asks that it be reformed, so as to exclude the former and include the latter. If this be so, the defendant, being the grantee of Robles, with notice of the mistake, is bound in equity to correct the mistake by making a new deed, which will describe the land intended to be conveyed by the first; but he is not bound to do so, unless, at the same time, the land, which was by mistake included in the first deed, is reconveyed to him. Of this the plaintiff seems to have been aware, for he offers to convey it, in his complaint. But, unfortunately, he is not in a position to do so. The deed from the Kochs to him is not defective. It does not follow the language of the deed from Robles to the Kochs, but describes the land precisely, as the plaintiff claims, it should have been described in the deed from Robles to the Kochs. A deed, therefore, from him to the defendant, of the land erroneously included in the deed from Robles to the Kochs would convey nothing, and would not cure the mistake in favor of the defendant, but would leave his title to that portion of the land as clouded and uncertain as the title of the plaintiff now is to the portion which he seeks. Had the deed from the Kochs to the plaintiff followed the language of the deed from Robles to the Kochs, the offer of the plaintiff to convey would have been to the point, and its performance would have secured to the defendant all the compensation or protection to which he is entitled, but, as it is, such compensation—so far as the complaint now shows—can come only from the Kochs.

2. Without undertaking to say how a court of law would construe the deed from Robles to the Kochs, we are satisfied that the alleged mistake so far clouds or casts in doubt the true location of the land, as to authorize a court of equity to correct it. The grantee of land is entitled to a deed, which is precise and accurate in its terms, and is not bound to be satisfied with one, which, by reason of its uncertainty, may involve him in litigation, or impair the market value of his title, although the uncertainty be of such a character as a court of law could overcome by a resort to the rules of construction. The mere fact that a resort to the technical rules of construction is necessary, in order to find the true location of the land, is proof that its language should be reformed, and we do not consider that a court of equity will deny relief

in such cases upon the ground that a court of law would be able to locate the land correctly, notwithstanding the mistake: Roberts v. Taliaferro, 7 Iowa, 113.

3. The point that the complaint is defective, because it is not alleged that the defendant, upon request, has refused to correct the mistake, is answered by the case of Gray v. Dougherty, 25 Cal. 266. The plaintiff's cause of action must be considered as dating from the date of the mistake, and not from the refusal of the defendant to correct it. The failure to allege a demand and refusal does not, therefore, go to the cause of action, but to the question of costs only; and, if the court becomes satisfied that the defendant would have corrected the mistake upon request, it will direct him to correct it, without costs.

4. The point that a court cannot correct a mistake in a deed, and give to the plaintiff possession of the land in the same action, is untenable. The general rule is, that a court of equity will not deal with a case by piecemeal, but will leave nothing open for future litigation, by settling the whole controversy, when it has obtained jurisdiction for any purpose; and this is so particularly if exceptions to this rule exist where law and equity are separately administered; there can be no ground for them under a system like ours, where the two jurisdictions are blended, and legal and equitable relief are both afforded in the same action, if, upon the facts, the parties, or either of them are entitled to both. If there is any sensible reason why, in a case like the present, the court should stop at the reformation of the deed, and force upon the plaintiff the necessity of bringing another action in the same court, to get possession from the defendant of the land conveyed by the deed as reformed, the learned counsel for the defendant has failed to suggest it. There is none—on the contrary, every sensible reason points the other way. If it is true of the law generally that it abhors a multiplicity of suits, much more is it true of our Code of Procedure. Its leading idea is to do away with all circumlocution offices, and to deal out, at one and the same time, not a part, but a full measure, of justice.

Under the foregoing views the points made upon the motion for new trial do not require special notice.

Judgment and order reversed, with leave to the plaintiff to amend by making the Kochs parties, or stating facts which will excuse their absence, and with directions to the court below to dismiss the action unless he does so within a reasonable time.

We concur: Crockett, J.; Rhodes, J.; Sawyer, C. J.

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## HENRY W. SEALE, Respondent, v. INA LOUISA GREER, Appellant.

No. 1464; June 8, 1868.

**Partition—Action of Commissioners—Presumption.**—The action of the commissioners under an interlocutory judgment in a partition proceeding is to be presumed to have been in accordance with the rules laid down in such judgment, if no error appears on the face of their report or those objecting to their actions do not make error therein affirmatively to appear.

**Partition.—A Party is not Entitled to Except to the Report** of the commissioners in partition, on behalf of others who have not complained.

**Partition—Effect on Controverted Title.**—A partition of land the title to which has been in controversy between the parties concludes them as to that title in the particular partition.

**Partition.—An Objection by a Party to a Partition,** that the part allotted to him is taken up to some extent by a road, must show that he would have been entitled to a further amount, equal in area to the road, had the latter been excluded.

**Partition — Improvements.—When an Interlocutory Judgment** has required the commissioners to set off the tracts in such manner that the tract allotted to each party shall include all his improvements, in order to have the report of the commissioners set aside, a party may not show that this course was not pursued in one instance unless he also shows how it could have been pursued without doing injury to the rights or interests of others.

APPEAL from Third Judicial District, Santa Clara County.

Suit for partition.

S. O. Houghton for respondent; Thos. Badley and B. S. Brooks for appellant.

RHODES, J.—By the interlocutory judgment it was ordered "that there be set off to the said several parties such portions of said premises as will include their respective improvements, provided, always, that the rights or interests of neither of the other parties be prejudiced thereby; and that there be set off to the said Henry W. Seale his share or interest upon the south side of said rancho, in such manner as to include his improvements, provided that the same can be done without prejudice to the rights of any of the others in interest."

Counsel for the defendants have cited many authorities to prove that the first portion of the order is equitable, just and proper, but the proposition is not doubted by the other side, and cannot be successfully assailed.

The question presented is, whether the commissioners have erred in the application of the rules laid down in the interlocutory judgment. No error appears on the face of their report, and as none will be presumed, the report ought not to be set aside, unless the parties excepting to it show such a state of facts as will make the alleged error affirmatively and clearly appear.

It is not shown that the tract of land allowed to defendant Mercier is not equal in value to his share of the whole rancho. Had the whole road been excluded from his tract, it would not necessarily follow that he would have been entitled to a further amount, equal in area to that occupied by the road. Whether the road increased, or diminished, the value of the tract is not shown, nor does it appear what was the opinion of the commissioners on that point; but it is certain that they were of the opinion that the tract allotted to him, including the roads, was equal in value to his share of the whole lands.

It is not alleged that the tract set off to him does not include his improvements, but he complains that the tract set off to the Seatons was not located on lands in his (Mercier's) possession.

The Seatons have not complained of the partition, and Mercier is not entitled to except to the report on their behalf. The fact that litigation was pending between him and the

Seatons respecting the title under which they claim does not give him any right to act for them; for the interlocutory judgment ascertained and fixed the rights of the several parties in the lands, and such determination, whatever may be the result of the litigation alluded to, is conclusive in this partition.

It is alleged that Mrs. Greer's share should have been set off so as to include all of her improvements. No complaint is made that the value of the tracts allotted to her is not equal to the value of her interest in the whole rancho. No facts are stated by her, or are shown by the affidavits presented by her, going to prove that the tract she now wishes set off to her could have been allotted to her without producing injury to her cotenants. There is the general statement, that her share could have been set off to her, as she now desires, without injury to the other parties, but this is denied by the other side. Had her share been set off, as she now demands, it clearly would have interfered with the location of the plaintiff's share at the south side of the rancho, as ordered by the interlocutory judgment. The tract at the northeastern portion of the rancho was set off to her, so as to include a house and improvements formerly in her possession, and this was done, as one of the commissioners testifies, at her request, made through her husband. Her husband denies that he made such request, but we could not say that the court erred in giving the greater credit to the statement of the commissioner.

And so of the tract at the Embarcadero. Both Mrs. Greer and the plaintiff claimed to be in possession of the tract, but the commissioners found that the plaintiff was in the possession, and allotted it to him.

The commissioners found it impossible to allot the portion either of Mrs. Greer or the plaintiff in one compact body; and the plat very plainly shows that the lands allotted to the plaintiff are quite as inconvenient in form as those allotted to Mrs. Greer.

A considerable portion of the lands allotted to the plaintiff are situated at the northern side of the rancho, and it is but reasonable to presume, in the absence of evidence to the contrary, that neither the lands allotted to the plaintiff, nor those to Mrs. Greer, could have been set off in other por-

tions of the rancho without injury to the interests of the other tenants in common.

The statement that the lands are not so set off as to include in the portion allotted to any one of the parties all of his or her improvements is not sufficient ground for setting aside the report, but it should have been further shown that the allotment could have been so made as to include in the portion of either more of his or her improvements, without injury to the rights or interests of the others.

Judgment affirmed.

We concur: Sprague, J.; Sanderson, J.; Sawyer, C. J.; Crockett, J.

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## WILLIAM McKENZIE, Appellant, v. HARVEY DICKINSON, Respondent.

No. 1462; June 29, 1868.

**Partnership—Rights of Partners in Property.**—While a partnership still is in existence and its affairs unsettled, the undivided assets of the firm cannot be said in law to be the individual private property of any one of the partners.

**Pleading.—A Party must Recover, if at All, According to the Allegations** of his pleadings, whatever the evidence introduced may be.

APPEAL from Twelfth Judicial District, San Francisco County.

Collins & Clement for appellant; G. F. & W. H. Sharp for respondent.

See McKenzie v. Dickinson, 43 Cal. 119.

SAWYER, C. J.—The complaint avers that prior to the 18th of January, 1861, plaintiff and defendant were partners in business under the firm name of McKenzie & Co.; that on said day the partnership was dissolved, and subsequently thereto, and prior to November, 1861, all the interest of the defendant in the property and assets of the firm was sold by the sheriff under an execution issued upon a judgment

against said defendant; that the said defendant, at some time unknown to plaintiff, and without his knowledge or consent, executed a promissory note, in the name of said firm, in favor of one Burns, for the sum of sixteen hundred dollars and interest at two per cent per month; that plaintiff was in no way informed of the execution of said note, and that it was in no way taken into account in the settlement and accounting had with reference to said partnership affairs; that, afterward, in March, 1864, said Burns recovered a judgment upon said note against said plaintiff, which said plaintiff was obliged to pay, and did pay, to the amount of three thousand and ninety dollars; and that no part of the consideration of said note ever came to the use of said plaintiff, or said firm of McKenzie & Co., but that the same was wholly received by said defendant, and applied to his own private use and benefit. Judgment for the amount is prayed.

The defendant denies that the partnership was dissolved at the time alleged in the complaint, or any other time, or that there had been a final settlement of accounts; or that plaintiff had ever paid said judgment, or that he had paid it out of his individual funds, or that the consideration had in whole, or in part, been received by said defendant for his own benefit, or applied to his own use; but avers that the note was executed on behalf of the firm, and that the cash received therefor was applied to the use of the firm; that the judgment thereon is against both parties and still remains unsatisfied.

The defendant then, by way of counterclaim, or cross-complaint, and for the purpose of obtaining affirmative relief, avers that on the 1st of January, 1857, said plaintiff and defendant entered into partnership as equal partners under the name of McKenzie & Co., without any limitation as to the time of its duration; that there has been no dissolution, and the partnership matters are still unadjusted and unsettled, and that on an accounting there will be over three thousand dollars due defendant; that it was the custom of plaintiff and defendant to make a yearly statement of their affairs; that on the 19th of January, 1861, an inventory of the affairs of McKenzie & Co. was taken, and there "was upward of seven thousand dollars of available cash—assets due said firm, besides the stock in trade, together with a large number of

sewing machines, steam engine, and building and lot," goodwill, etc.; that out of these assets McKenzie was to retain four thousand five hundred and seventy-seven dollars, and of the balance one-half belonged to each; that plaintiff had collected and received of the firm assets some fifteen thousand dollars and upward, and retained the same, refusing to account; that at the time of said partial accounting, on the 19th of January, 1861, it was agreed that the partnership should continue, and that defendant should go to New York and purchase goods on account of the firm; that, in pursuance of the understanding, the defendant did go to New York by the steamer of January 21, 1861; that immediately on his arrival at New York defendant commenced purchasing and shipping, and continued till the 1st of April to purchase and ship goods through the house of Wm. T. Coleman & Co., to be delivered to McKenzie & Co. at San Francisco; that the amount so purchased and shipped was twenty-five thousand dollars; that he then proceeded to San Francisco, and on his arrival on the 6th of May, the plaintiff for the first time informed defendant that he considered the partnership dissolved, and that during defendant's absence all the interest of said defendant in the assets of the firm of McKenzie & Co. had been sold out by the sheriff on an execution against said defendant individually, in favor of one Lane, and all debts due defendant, or credits belonging to him, had been garnished in plaintiff's hands; that plaintiff refused to give any account of the partnership matters; that plaintiff has carried on the business ever since under the same firm name, with the capital stock, machinery and instruments, and in the firm building, and defendant claims that it shall be held to be on joint account. Defendant further avers that on the 22d of January, 1861, while they were partners, as aforesaid, the plaintiff, "as trustee for the defendant," purchased of one Lane a certain judgment against the defendant; that said plaintiff purchased the judgment for the sum of two hundred and fifty dollars, "and that the same was for the use and benefit of plaintiff"; that, at the request of plaintiff, the assignment was made in the name of one Gordon; that Gordon did not give any consideration, but that the assignment to said Gordon was made with the fraudulent intent on the part of plaintiff to have an execution issued and the

interest of said defendant in the partnership assets sold; that plaintiff afterward caused an execution to be issued, and, by virtue thereof, sold the defendant's interest in the partnership assets, and himself purchased the same in the name of Gordon; that Gordon paid nothing whatever for said purchase, "but the same was really, in fact, made for the sole benefit of McKenzie & Co.," and for the purpose of defrauding the defendant; that, at the time of procuring the assignment to Gordon, the plaintiff had in his own hands belonging to the defendant, a large amount of money, greatly exceeding the amount paid to said Lane for said assignment, and that the same was purchased, and paid for, with the private and individual funds of the defendant; and that the same ought to have been taken in his name; that the said proceedings were had for the purpose of defrauding the defendant of his share of the partnership assets; that Gordon never claimed to own any portion of the property purchased under the execution, but that plaintiff has always received and claimed, and now retains and claims, the whole property, so sold, as his own, and that he only used Gordon as an instrument for accomplishing his scheme of defrauding the defendant. Defendant claims that there is a large amount of property now in the hands of plaintiff which belongs to the firm, and prays an account of the partnership affairs, and for a final settlement and dissolution of the firm.

The foregoing is the substance of the material allegations of the pleadings on both sides, particularly of the counterclaim or cross-complaint, upon which affirmative relief is prayed. It will be seen that the allegations of the answer all relate strictly to property which is alleged to be partnership property, and the only relief sought is an account of the partnership affairs. There is no allegation that any individual property, real or personal, of the defendant was sold under the judgment, purchased by the plaintiff, and no lands described at all. The only allusion, direct or remote, to lands of any sort, is the very general one in the statement, that among the assets of the firm, of which an inventory was taken on the 19th of January, was a "building and lot," without describing the lot. This lot, wherever it was, is thus averred to be a part of the assets of the firm, and not individual property. There seem to be some inconsistencies in the allega-

tions of the cross-complaint. Whatever the pleader's own theory of the case may have been, he has not been very happy in expressing it. Thus it is alleged that "the plaintiff, as trustee for this defendant," purchased the Lane judgment, but in the same paragraph he avers that "said plaintiff purchased the same for the consideration of two hundred and fifty dollars, and that the same was for the use and benefit of the plaintiff." And further along it is alleged that plaintiff caused defendant's interest in the partnership assets to be sold under execution issued on said judgment, and that he purchased the same in the name of Gordon; that Gordon paid no consideration, but the purchase "was really in fact made," not for plaintiff, or defendant, but "for the sole use and benefit of McKenzie & Co." It is not stated whose funds were used in the purchase at sheriff's sale, or whether any other than a credit on the judgment, but, in the very next clause, it is alleged that, at the time plaintiff procured the assignment of the judgment to Gordon, he had in his hands a large amount of money belonging to defendant, exceeding the amount paid to Lane for the judgment, "and that the same was purchased and paid for with the private and individual funds of this defendant." Thus sometimes the plaintiff is alleged to be the beneficiary, sometimes McKenzie & Co.—the firm—and sometimes the defendant. And sometimes the funds in the hands of McKenzie & Co. seem to be treated as partnership funds, and sometimes they seem to be treated as though there had been a final settlement, and the assets divided, and McKenzie was in possession of the individual funds of the defendant rather than of the firm. The averment relating to the individual funds of the defendant in plaintiff's hands must be read in connection with the other allegations of the pleading, and, when so read, it must be regarded as referring only to the partnership funds in the hands of plaintiff, in which defendant has an interest as a member of the firm. In other words, if the partnership affairs should be settled at that point of time, the defendant's share of the funds would exceed the amount paid for the Lane judgment, or, at most, that the firm is indebted to defendant for much more than the amount paid for the judgment. We do not understand that more is claimed for it. But, while the partnership is still in existence, and its

affairs unsettled, the undivided assets of the firm cannot be said, in law, to be the individual, private funds of any one of the partners. And the partnership, in this instance, at the date of the purchase of the Lane judgment, must be regarded as dissolved, and its affairs finally settled, as claimed by plaintiff, or still existing and unsettled, as claimed by defendant. The latter is the theory of defendant's case, and on this theory there do not appear to have been any individual funds of defendant in the hands of plaintiff. The partnership being annulled, the funds were partnership funds, whether one or the other member of the firm had more than his share of advancements. The pleading relates solely to property alleged to be partnership property, and the whole of defendant's case is to procure a settlement of the partnership transaction, and to obtain his share of the partnership assets, of which the plaintiff, during his absence on the business of the firm, sought to deprive him by purchasing, in the name of another, with the funds of the firm, a judgment against him individually, and selling out his interest in the partnership assets. No complaint is made that plaintiff went outside of the partnership, and also, fraudulently, sold any of the individual, private property of defendant, and no relief for such a wrong is sought in this action.

We have been thus particular in stating the pleadings, for the purpose of comparing the cause of action set out with the facts found, and the relief granted, and ascertaining whether the relief afforded is within the scope of the case made by the pleadings.

The court finds that the partnership was not dissolved on the 19th of January, 1861, nor at any time prior to the commencement of this suit; that on said nineteenth day of January the said firm had solvent and collectible debts due the firm, amounting to twelve thousand dollars; that on the same day said firm had in their store on Clay street personal property amounting to three thousand three hundred and thirty dollars; that on the same day defendant, Dickinson, was seised in fee simple, in his own right, of a certain piece of land on Virginia street in the city of San Francisco, forty feet front by sixty feet deep, described by metes and bounds; that on said day the said defendant, Dickinson, was also seised in his own right of a "certain water lot, and house erected

thereon, situate on Clay street in said city," twenty-five feet by fifty-nine feet nine inches, described by metes and bounds, "and which, at the times hereinafter mentioned, was occupied by the said firm of McKenzie & Co., as a store"; that, on the 21st of January, 1861, said defendant went to New York, upon business of the firm of McKenzie & Co.; that, on the 11th of March, 1861, the plaintiff, during the absence of defendant from the state, while the partnership continued, sought out Lane, who held a judgment for two thousand three hundred and forty-nine dollars and twenty-eight cents, with interest at the rate of five per cent per month, recovered against defendant, his copartner, on the 3d of June, 1857, and purchased the said judgment for five hundred dollars, and that the said sum of five hundred dollars paid was a part and parcel of the partnership funds of said firm of McKenzie & Co.; that, at plaintiff's request, the judgment was assigned to one Joseph Gordon; that Gordon paid no part of the purchase money, but the "value thereof proceeded from and was paid by the plaintiff, as aforesaid" (that is to say, as stated in the preceding finding, out of the partnership funds), "and the said assignment was taken in the name of said Gordon for the purpose of defrauding said Harvey Dickinson"; that "at the time of the purchase" of said judgment "said plaintiff had in his possession, belonging to the defendant, ample and sufficient funds and property to discharge the same"; that after the assignment plaintiff procured an execution to be issued on the judgment, and had the interest of his said partner in the firm of McKenzie & Co. sold thereunder, and also the said real estate of the defendant situate on Clay and Virginia streets; that Gordon became the purchaser, but that all the purchase money was paid by plaintiff, and no part by Gordon; that the purchases were only colorably made in the name of Gordon, in order to defraud defendant; that Gordon had no interest whatever in the property; that the sheriff delivered possession of the property purchased to Gordon, who transferred and delivered it to plaintiff; that the real estate was conveyed by the sheriff to Gordon, who entered into possession and held for plaintiff; that plaintiff collected and received to his own use the rents and profits of the said real estate, and received them in gold coin, and that the monthly value of the same is one hundred

and twenty dollars per month; that the note in suit was given on account of the firm, and that plaintiff had satisfied the judgment recovered by Burns.

A reference having been made, to take an account of the partnership matters, the commissioner reported, and the court found, that, on a final settlement, plaintiff was indebted to the defendant in the sum of twelve thousand seven hundred and thirteen dollars and ten cents in gold coin. And, as a conclusion of law, the court finds that defendant, Dickinson, is the owner of the Clay and Virginia streets property as against plaintiff and all persons claiming under him, as trustee or otherwise, and that plaintiff ought to convey the same to the defendant; that defendant is entitled to be reinstated in the exclusive possession of the said premises, and that Gordon, as trustee of plaintiff, ought to join in the conveyance, but as he is not a party, he cannot be compelled to do so in this action. Judgment was accordingly rendered in favor of defendant, against plaintiff, for the sum of twelve thousand seven hundred and thirteen dollars and ten cents and costs, and that the copartnership be dissolved; that the plaintiff McKenzie, within ten days after the entry of judgment, execute to defendant, Dickinson, a proper conveyance of the Clay street and Virginia street property (giving a description thereof by metes and bounds), and in default thereof, that the court commissioner be authorized and required to execute a conveyance to the defendant, in the name and on behalf of the plaintiff; and that defendant be restored to, and placed in, the actual possession of said premises.

The appeal is both from the judgment and the order denying a new trial.

After looking into the evidence contained in the statement on motion for new trial, we are not prepared to say that the evidence does not justify the findings of the court upon the main issues in the case. The testimony is conflicting; but taking all the testimony, as now presented, it certainly does look as though there was no intention of dissolving the partnership before Dickinson left for New York; that Dickinson went to New York on the business of the firm; and that, as soon as he had gone, the plaintiff took advantage of the knowledge, acquired in his partnership relations, to seek out

the owner and secretly and fraudulently buy up in the name of another, with the partnership funds, a large outstanding judgment against his partner, and sell out, not only his interest in the partnership, but also a considerable amount of valuable real estate held by him, with a view of fraudulently appropriating the property to his own use; and the court so found the facts to be. But, however this may be, we do not see how the judgment can be sustained; and without a critical examination of the questions arising on the appeal from the order denying a new trial, we shall rest our decision upon the questions arising on the appeal from the judgment, disclosed by the judgment-roll alone.

It is quite clear to our minds, from the synopsis before given, that the findings and judgment cover a much wider field than the case made by the pleadings justifies. In finding the facts, and rendering judgment, the court must, to some extent at least, have overlooked the issues actually made by the pleadings, and had its attention mainly directed to the evidence introduced. A party must recover, if at all, according to the allegations in his pleadings, whatever the evidence introduced may be: Sterling v. Hanson, 1 Cal. 479; Boggs v. Merced Mining Co., 14 Cal. 279, 356; Smith v. Owens, 21 Cal. 23, 24; McComb v. Reed, 28 Cal. 284, 87 Am. Dec. 115; Barron v. Frink, 30 Cal. 486–489. The allegations in this case, upon which defendant recovered, relate strictly to partnership property, and look solely to an account of the partnership property. There is no allegation that anything was sold under the judgment, except partnership property. There is no allusion whatever to the fact that the individual property of Dickinson was sold, and no claim set up, to have any sale of his undivided real estate set aside, or individual real estate sold adjudged to be held in trust for Dickinson, and to be conveyed to him, or any account taken, and recovery had, of the rents and profits, or any recovery of the possession of such lands sold, and no allegations, under which such relief could be granted. No allusion of the remotest character was anywhere made to the Virginia street property, and none to the Clay street property, unless the latter is referred to under the terms "building and lot." But, if referred to, it was averred to be partnership property, and the court has found, against the averment, that it was, and

still is, in equity the individual property of Dickinson alone. It was upon this theory that the title, which apparently passed by virtue of the sale under execution, so far as it was in plaintiff, was directed by the judgment to be conveyed to Dickinson, a recovery of the rents and profits had, and the possession restored. There is nothing, then, in the pleadings to justify the judgment for a conveyance, for the rents and profits, or for the possession of these two specific pieces of real property, or any other judgment, affecting them, on the theory that they were the individual property of Dickinson, constituting no part of the partnership assets. And this is the theory upon which this part of the judgment rests. The difficulty is not, as insisted by respondent, that the allegations of the counterclaim are defective only, and are cured by the verdict. It is not a question of insufficiency only of the pleading so far as it relates to the real estate in question. There is a total want of averments embracing the subject matter. The subject matter is not within the scope of the case presented by the pleadings: Barron v. Frink, 30 Cal. 489. The judgment—the relief granted—therefore, is not justified by the pleadings, and the error is presented by the judgment-roll.

The respondent claims that, if the judgment is erroneous in these respects, it can be modified, and the proper judgment rendered on the findings, without a new trial. There is nothing in the findings of the court which enables us to render the proper judgment, and it is not pretended that there is, unless we can also look to the report of the commissioner, upon the accounting had before him. This is not a part of the judgment-roll, and if it was, schedules "A" and "B"—the former showing a statement of the partnership account, and the latter the individual account between plaintiff and defendant—are not in the record, and it would be difficult, from the portion of the report shown, to determine how the rents and profits of the real estate of Dickinson, purchased under the execution, received by plaintiff, and appropriated to his own use, would affect the final result. It does not distinctly appear in the report upon what principle they were disposed of.

The commissioner also reports that "plaintiff, for and on account of said defendant, paid the sum of five hundred dol-

lars for the judgment known as the Lane judgment"; and it must be presumed that said amount was credited to the plaintiff in the individual and not the partnership account, as paid for defendant individually. The court, however, in the tenth and eleventh findings, finds that the judgment was paid for out of the partnership funds. If so, the other partner may claim the benefit of the purchase on behalf of the partnership; but we do not see upon what principle Dickinson can claim the benefit of the purchase with partnership funds for himself individually. If the funds of the firm have been used to purchase the judgment, the firm is clearly entitled to the benefit of the purchase, and the judgment belongs to the firm. On that theory Dickinson becomes the judgment debtor to the firm in the amount of the judgment. If, at the same time, the firm is indebted to him, in the accounting one indebtedness might very well be set off against the other, so far as they go, and we are inclined to think, upon the facts of the case, as they now appear, that this is the view that should have been taken in accounting. But the question has not been discussed, and we refrain now from passing definitely upon it. There would certainly be a large difference in the result, if a judgment for several thousand dollars, purchased for five hundred dollars with the partnership funds for the joint benefit of the firm, should be treated in the accounting as though it were purchased with the private funds of Dickinson for his individual benefit. We only refer to this matter now, to show the necessity for a reinvestigation of the facts, in order that it may be more distinctly ascertained what strictly pertained to the partnership, and what strictly to the respective parties individually, and that an accounting may be had in full view of this important distinction.

We cannot help thinking that no little confusion of ideas runs through the case, as now presented—resulting, perhaps, from an embarrassing uncertainty in the mind of defendant's attorney as to what the facts might turn out to be at the trial—and that exact justice cannot be done without a new trial.

We think, also, that the pleadings might be so amended as to more fully present the exact issues to be tried, and the merits of the case.

Judgment reversed, and new trial granted, with leave to the parties to amend their pleadings, as they may be advised.

We concur: Crockett, J.; Rhodes, J.; Sanderson, J.; Sprague, J.

PEOPLE, Respondent, v. ALLEN McDONALD, Appellant.

No. 1624; June 30, 1868.

**Continuance.—Except on a Showing of Abuse of Discretion** on the part of the trial judge, his action in disposing of a motion for a continuance is not subject to interference on appeal.

**Larceny.—When a Charge to the Jury Defines Grand Larceny** correctly as "the felonious stealing, taking, carrying away," etc., and in the next sentence tells the jury that if they find the defendant "did steal, take, carry away," etc., the property, naming it and its owner and stating its value as of fifty dollars or more, the omission of the word "feloniously" in the latter sentence is not reversible error, since "felonious" in the preceding sentence prevented the jury from being led astray.

APPEAL from County Court, Tuolumne County.

Attorney General for respondent; E. A. Rodgers for appellant.

CROCKETT, J.—The defendant was indicted for grand larceny, and having been convicted on the trial, has appealed from the judgment, and from an order denying a motion for new trial.

Three errors are assigned, to wit: 1st, that the court erred in refusing to continue the cause on the application of the defendant; 2d, that the court erred in its charge to the jury; 3d, that the court should have granted a new trial on the ground that the verdict was not supported by the evidence.

Neither of these points is tenable—except in case of an abuse of its discretion by the district court, this court will not interfere with its action in granting or refusing a continuance. We discover no such abuse in this case. On the contrary, it is evident from the defendant's affidavit, and the

testimony given on the trial, that the evidence of the absent witness would not materially have affected the result. The charge of the court, taken as a whole, correctly stated the law—after defining correctly the crime of grand larceny as the felonious stealing, taking, carrying away, leading or driving away the personal goods or property of another of the value of fifty dollars or more, the court proceeded, in the next sentence, to charge the jury that if the defendant "did steal, take, carry, lead or drive away, the six oxen, the property of said Murray, and that they were of the value of fifty dollars or more," he should be found guilty of grand larceny. It is objected that the word "feloniously" was omitted from this portion of the charge. If the sentence we have quoted stood alone, unexplained by the context, the objection would be well taken. But the two sentences, construed together, could not well be misunderstood. It is so obvious that the stealing, taking, carrying, leading or driving away, in the second sentence, refer to the "felonious" stealing, taking, etc., in the next preceding sentence, that it is impossible the jury could have been led astray by the omission of the word "feloniously."

Instead of being contrary to the evidence, we think the verdict is fully supported by the evidence.

Judgment affirmed.

We concur: Sprague, J.; Sanderson, J.; Sawyer, C. J.

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## NICHOLAS LARCO, Appellant, v. FREDERICK ROEDING, Respondent.

No. 1614; June 30, 1868.

**Appeal—Weighing of Evidence.—In the Absence of Distinct Findings** of fact and conclusions of law, the evidence will be looked into no further on appeal than to see that there was some evidence tending to support the judgment of the court below.

**Statute of Limitations—When Begins to Run.**—Where a sum of money is to be paid by the debtor "when my circumstances hereafter may permit me," the statute of limitations runs from the time

the debtor has money to pay with, rather than from the time he can pay without inconvenience to his business.

**Estate of Decedent.—In an Action by a Creditor of a Deceased** person to establish a claim against the estate, rejected in the probate proceedings, an announcement by the court that the plaintiff's testimony, although admitted without objection, was not to be given the same weight as if the suit had been during the debtor's lifetime, is no ground for reversal, even if erroneous, in case the judgment is a proper one on the principal question.

APPEAL from Fourth Judicial District, San Francisco County.

B. S. Brooks for appellant; S. L. Johnson for respondent.

CROCKETT, J.—This action is founded on an instrument in writing in a foreign language, made by one Ihmels, the defendant's testator, in February, 1851, to the plaintiff; wherein, after acknowledging an indebtedness of eleven hundred and fifty-eight dollars to the plaintiff, he promises to pay it "when my circumstances hereafter may permit me"; or as the plaintiff's counsel claims is the correct translation "when my future circumstances shall permit it." Ihmels died in October, 1866, leaving a will, which was duly probated, wherein the defendant was appointed executor, and duly qualified as such. The plaintiff duly presented his demand to the executor for allowance, who refused to allow the same; and this action was commenced in February, 1867, to establish the demand as a valid claim against the estate.

The complaint, after setting out a copy of the instrument, and alleging that the debt remains unpaid, avers "that the circumstances of the said Ihmels posterior to the date of said instrument did not permit him to pay the same until within four years last past; but that after that date and before the death of said Ihmels he became able to pay the plaintiff's claim, and so continued up to the time of his death, and his executor is now able to pay the said claim out of the assets in his hands as executor."

The answer admits the execution of the instrument; but denies that the circumstances of Ihmels did not permit him to pay the demand until within four years next preceding his death, and avers the truth to be to the contrary; and as a defense relies on the statute of limitations.

On the trial the plaintiff and defendant were examined as witnesses, each on his own behalf, and other witnesses were also called. The court decided the cause for the defendant and entered judgment accordingly; but there were no findings, nor exceptions for want of findings. In making its decision, the court, amongst other things, announced that inasmuch as the claim was against the estate of a deceased person, the evidence was to be scrutinized more closely than if the suit was against Ihmels himself, and the same weight was not to be given to the testimony as it would have been entitled to if the suit had been against Ihmels; that notwithstanding the testimony of the plaintiff was admitted without objection, it was not entitled to the same weight as if Ihmels had been living; to which announcement the plaintiff excepted.

The plaintiff moved for a new trial, assigning as grounds: 1st, that the evidence was insufficient to justify the decision; specifying as the particulars that it did not appear from the evidence that the circumstances of Ihmels permitted him to pay the debt, until within four years before suit brought, nor that the cause of action accrued more than four years before his death; 2d, errors of law at the trial, assigning for the particulars the announcement of the court before mentioned; and that if the facts which the defendant's testimony tended to prove had been fully proved, they would not have shown that the action was barred by the statute.

The motion for new trial was denied and the plaintiff has appealed.

We do not propose to review the testimony as to the circumstances of Ihmels. There are no findings to inform us as to the facts which the court considered to be established, nor as to the particular conclusions of law which the court deduced from those facts. Whether or not the evidence was insufficient to justify the decision of the court is a question which we will not look into on appeal, further than to see that there was some evidence tending to support the judgment. In this case, it is plain there was some evidence of that character, whether the instrument be construed as an undertaking to pay as soon as he had the pecuniary ability to do so, or as a promise to pay as soon as he could do so without prejudice to his business. If the former is the proper

construction of the instrument, as we are inclined to think it is, the proof makes it clear beyond dispute, that Ihmels was able to pay the debt many years before suit brought. And if the proper construction of the instrument be as the plaintiff claims, to wit, that Ihmels was not to pay until he could do so without injury to the mercantile business in which he was engaged, there was proof tending to support the judgment even upon this construction of the instrument. We have repeatedly held that in such cases we will not disturb the judgment.

The announcement by the court, in respect to the weight to be attached to the evidence, is no ground for reversing the judgment. It was only one of the reasons assigned by the court for its decision; and there may have been, and we think there were, other sufficient reasons to justify the judgment. If the court was wrong in being influenced by such considerations, we would not, for that reason, reverse a judgment which was proper on the whole case as made.

Judgment affirmed.

We concur: Sanderson, J.; Sprague, J.; Sawyer, C. J.

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JOHN R. MEAD, Respondent, v. M. G. ELMORE, Appellant.

No. 1572; July 11, 1868.

**Corporate Stock—Transfers—Entry in Books.**—Under the statute controlling transfers of stock in incorporated companies (Stats. 1853, p. 87, sec. 9), transfers not entered on the books of the company are valid against all the world except subsequent purchasers of the stock in good faith and without notice.

APPEAL from Fifteenth Judicial District, San Francisco County.

Jarboe & Harrison for respondent; Clark Churchill for appellant.

SANDERSON, J.—Upon the merits this case is not distinguishable from Weston v. Bear River and Auburn Water and

Mining Company, 5 Cal. 186. 63 Am. Dec. 117; the same case on a second appeal, 6 Cal. 425; and Naglee v. Pacific Wharf Co., 20 Cal. 529. In those cases the statute in relation to the transfer of stock in incorporated companies (Stats. 1853, p. 87, sec. 9) has received a construction from which, upon the principle of stare decisis, we cannot now depart.

It was held in those cases that transfers of stock, which have not been entered on the books of the company, as provided in the statute, are nevertheless valid as against all the world, except subsequent purchasers in good faith without notice.

The case shows that the relator purchased with notice that the stock in question had been previously hypothecated, and afterward sold, by the defendant in the execution. and that at the time of the levy he had no property whatever in the stock.

Upon the authority of the cases to which we have referred, the order of the court below must be reversed.

So ordered.

We concur: Crockett, J.; Sprague, J.

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## THOMAS DWYER, Respondent, v. CALIFORNIA STEAM NAVIGATION CO., Appellant.

No. 1662; July 13, 1868.

**Instructions.—Counsel Who Make No Effort at the Trial to have** the jury given full instructions, and subsequently claim on appeal that the court prejudiced the case and misled the jury by charging as to one branch of the case at the expense of another, indulge in a reprehensible practice.

**Counsel Should Act in Good Faith Toward the Court,** and in emergencies not remain silent in order to invite an inadvertence, with a view, if possible, of torturing it into an error.

**Appeal—Error Invited by Counsel—Damages.**—An appeal based on conduct of the trial court, invited by counsel for the purpose of providing points for appeal, and not in fact prejudicial to his client, is to be regarded as a frivolous appeal, and in such cases on respondent's motion damages should be awarded.

APPEAL from Sixth Judicial District, Sacramento County.

R. C. Clark for respondent; Jas. L. English and A. Comte, Jr., for appellant.

SANDERSON, J.—The appellant asks for a new trial upon two grounds: 1st. Insufficiency of the evidence to justify the verdict; and 2d. Errors in the instructions of the court.

There are two respects in which it is claimed the evidence was insufficient: 1st, as to the cause of the fire, which burned the plaintiff's wood, and damaged his barge—whether it was caused by sparks from the smokestack of the defendant's boat, or by some other means, with which the defendant was not connected; and 2d, as to the condition of the bonnet or spark-catcher attached to the smokestack of the defendant's boat.

We have read with care all the evidence contained in the transcript, and the presumption is, that it contains all the evidence offered at the trial, having any relation to the foregoing points, and have no doubt as to the sufficiency of the evidence in both respects. Upon the question whether the fire was caused by sparks from the smokestack of the defendant's boat, there is no pretense for saying, as claimed by counsel for the appellant, that there is no evidence in favor of the proposition that the fire was so caused. If counsel means to say that none of the witnesses testified that they saw a spark leave the smokestack—that they followed its flight through the air and saw it fall upon the plaintiff's barge, and convert it into a bonfire—they are, undoubtedly, strictly correct. There was no such evidence—on the contrary, the evidence was circumstantial, but it was of a very conclusive and satisfactory character. There was no conflict—it all tended the same way.

The same is equally true of the testimony in relation to the condition of the sparkcatcher. The court, in its instructions, intimated that there might be some conflict in the testimony in that respect, but we are at a loss to discover what part of the testimony created such an impression in the mind of the court. Whatever conflict there was, was confined to the testimony on the part of the plaintiff, for no testimony was introduced on the part of the defendant. If the sparkcatcher was in good

repair and condition, it is incredible that the fact was unknown to the officers and crew of the boat; and the failure to call them justifies the inference that the plaintiff's witnesses were not mistaken as to the condition of the sparkcatcher.

The points made against the instructions are equally frivolous. It is claimed that undue prominence was given to the question as to the condition of the sparkcatcher, by the court's omitting to charge upon the question as to the cause of the fire. If the learned counsel for the defendant was of that opinion, why did he not impart equal prominence to the latter question, by asking the court to instruct the jury upon the evidence in relation to it, instead of remaining quietly in his seat, fishing for straws to rescue a hopeless case. The claim that the court prejudiced the case, or misled the jury by charging as to one branch, and not as to another, comes with a bad grace from counsel who made no effort to see that full instructions were given. Such a practice is not to be commended. Counsel should act in good faith toward the court, and not court an inadvertence by remaining silent, with a view, if possible, of torturing it into an error. It is very certain that the law should not be strained in aid and countenance of such a practice.

We think the appeal frivolous, and the claim of respondent for damages on that ground well founded.

It is, therefore, ordered, that the judgment and order of the court below be affirmed with five per cent damages.

We concur: Sawyer, C. J.; Sprague, J.; Crockett, J.; Rhodes, J.

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PEOPLE, Respondent, v. TIMOTHY LYNCH, Appellant.

No. 1715; August 11, 1868.

**District Attorney—Assistance by Other Attorneys.**—The statute prescribing the duties of the district attorney does not, either expressly or by implication, prohibit the court from allowing other attorneys to assist that officer in prosecuting persons charged with crime.

Attorney General for respondent; Tyler & Hambleton for appellant.

SAWYER, C. J.—There is nothing in the action of the court allowing Mr. Porter to assist the district attorney, and to take the most active part at the trial in the prosecution of the case, to justify a reversal of the judgment. The matter was one for the sound discretion of the court. The statute referred to by appellant is simply a statute prescribing the duties of the district attorney. It does not expressly, or by implication, prohibit the court from allowing other attorneys to aid the district attorney in the prosecution of parties charged with crimes. The practice, also, very generally prevails, and doubtless the ends of justice are often subserved by such assistance.

We think the testimony of the accomplice corroborated by other evidence tends strongly to connect the defendant with the commission of the offense, and that the verdict of the jury is justified by the evidence. The very facts about which appellants' counsel admits there is no dispute are corroborative facts having such tendency. We see no good ground for disturbing the verdict. The judgment must be affirmed, and it is so ordered.

We concur: Sprague, J.; Crockett, J.

SANDERSON, J.—I agree with the chief justice in holding that it was within the discretion of the court below to allow Mr. Porter to assist the district attorney in the prosecution of the case. Upon that point I think the case of People v. Blackwell, 27 Cal. 65, is conclusive. But after a careful examination of all the testimony I have been unable to find any evidence which in my judgment tends to connect the defendant with the commission of the offense, within the meaning of the three hundred and seventy-fifth section of the Criminal Practice Act, except the testimony of the accomplice, Casey, and for this reason I think the order of the court below denying a new trial should be reversed and a new trial granted.

A. N. DAVISON, Petitioner, v. BOARD OF EXAMINERS, Respondent.

No. 1749; September 3, 1868.

**Militia.—The Allowance of Money, Under Laws of 1863, page 445, to duly uniformed military companies, payable to their several commanding officers, was intended to defray necessary company expenses and not for the benefit of the members as individuals.**

**Militia.—The Law of 1863 Allowing Three Hundred Dollars to each uniformed company, payable to its captain or commanding officer, cannot be availed of, after its repeal, by a captain of a company long disbanded.**

Mandamus.

Geo. Cadwalader for petitioner; Attorney General for respondent.

SAWYER, C. J.—The company of which the petitioner, A. N. Davison, was captain, was mustered out on the 24th of May, 1866. On the 10th of April, 1868, nearly two years after the company had been disbanded, the petitioner, a commanding officer, certified to the board of military auditors a claim for portions of the three hundred dollars per annum allowed under the fourteenth section of the "Act in relation to the militia of the state," as amended in 1863, corresponding to the portions of the years from April 25, 1863, to January 4, 1864, and from January 1, to May 24, 1866. The reason for the long delay in presenting the claim does not appear. The board of examiners refused to recognize the claim, and a peremptory mandate is sought to compel its allowance.

Said section 14 provides that: "The sum of three hundred dollars annually shall be audited by the board of military auditors and paid out of the military fund, to each duly uniformed company of sixty active members . . . . and be receipted for by the captain, or commanding officer of said company": Laws 1863, p. 445.

If there is no other difficulty in the way, it seems clear to us that the petitioner is not entitled to demand or receive the money. The allowance under the act was made to the com-

pany, as an organized body, to defray its necessary expenses as a company, and not for the benefit of the members as individuals. The company has long since ceased to exist as an organized body recognized by law, and it has no captain or commanding officer, and the law itself under which it formerly existed has been repealed. There was a company, and a commanding officer, but neither now exists as such. The law has provided no representative, or successor in interest, authorized to call upon the state for the sum authorized to be paid, or to appropriate or dispose of it when received. Or if there is any such provision, it has not been brought to our notice. If the state was liable to the claim at any time prior to the disbanding of the company in May, 1866, there has been, since that time, no body, or officer in existence, entitled to demand or receive it.

Under those views it is unnecessary to discuss the other points made in the briefs.

The mandate must be denied, and it is so ordered.

We concur: Crockett, J.; Sprague, J.

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FANNY G. FRISBIE, Respondent, v. LEVI H. WHITNEY et al., Appellants.

No. 1827; September 9, 1868.

**Ejectment.—On Appeal from a Judgment in an Action Involving** title to land, where at the trial two patents were admitted in evidence and the deed to the plaintiff, and no motion was made to exclude the patents as not embracing land described in the deed, it is presumed, if there are no findings of fact and the record contains neither of the patents, that a part of the land so described was included in one of the patents and the rest of it in the other.

**Husband and Wife.—A Married Woman may Sue Without Her Husband** joining as a plaintiff, in an action concerning her separate property.

APPEAL from Seventh Judicial District, Napa County.

Action of ejectment.

Patterson, Wallace & Stow for respondent; M. A. Wheaton for appellants.

CROCKETT, J.—The main point relied upon for a reversal of the judgment is, that there was no proof that the land occupied by the defendants was included as well in the patents to Frisbie as also in the deed from him to the plaintiff. The case shows that two patents were put in evidence, only one of which was objected to; and the objection was, that the parties had not connected themselves with the Vallejo title. The objection was properly overruled and both patents were read in evidence, without further exception. The deed to the plaintiff was objected to, on the sole ground that the signature was not proved. The proper proof was then made and the deed admitted. A witness was then called, who examined one of the patents and the deed, and who testified that the boundaries described in this patent includes a portion of the land described in the deed, and that the defendants occupied a portion of the land included in the deed. Neither of the patents is found in the record, and there were no findings of fact; under these circumstances, the presumption is that one of the patents included a portion of the land described in the deed, and the other, the remainder. There was no motion to exclude either of the patents, on the ground that it did not embrace any portion of the land described in the deed. No such point was made on the trial, and it is too late to raise it for the first time here. It is also insisted that the plaintiff, being a married woman, cannot maintain the action, without uniting her husband in it. But this proposition is answered by section 7 of the Practice Act, which allows a married woman to sue alone, "when the action concerns her separate property": Snyder v. Webb, 3 Cal. 83; Kays v. Phelan, 19 Cal. 128. There is no other point worthy of discussion, and we cannot but regard the appeal as frivolous.

Judgment affirmed and remittitur ordered to issue forthwith.

We concur: Sawyer, C. J.; Rhodes, J.; Sanderson, J.; Sprague, J.

JOSEPHINE RUFFATT, Appellant, v. W. F. CASHMAN, Respondent.

No. 1605; September 24, 1868.

**Appeal.—Where There has Been Conflicting Evidence at the trial the findings of the trial court are not to be interfered with on appeal.**

APPEAL from Fifteenth Judicial District, San Francisco County.

E. B. Drake for appellant; G. Barstow and E. J. Pringle for respondent.

SAWYER, C. J.—This is an action to recover lands in the military post of the city of San Francisco, toward the ocean, the plaintiff relying on prior possession from 1852 and 1853. Defendants deny the possession of plaintiff's grantors, and set up the statute of limitations, and also in case possession was ever had, rely on abandonment. The court found in favor of defendants, and entered judgment accordingly. Plaintiff moved for new trial on the sole ground that the evidence is insufficient to justify the finding. The motion having been denied, plaintiff appeals, and relies on the same grounds to reverse the judgment.

The evidence is conflicting, and is clearly within the rules so often laid down by this and other appellate courts upon the subject of reversing judgments on the ground relied on. We see nothing to justify us in disturbing the finding.

Judgment and order affirmed, and remittitur directed to issue forthwith.

We concur: Rhodes, J.; Sprague, J.; Sanderson, J.

WILLIAM HODGES, Appellant, v. CHARLES A. CUSHING, Respondent.

No. 1694; September 28, 1868.

**Appeal—Verdict not to be Disturbed.**—Where the case on trial is one in which the jury might have found either for the plaintiff or for the defendant, without becoming obnoxious to the charge of passion, prejudice, misconception or caprice, the verdict is not to be disturbed on appeal.

APPEAL from Fifteenth Judicial District, San Francisco County.

Porter & Holladay for appellant; Barstow & Tompkins for respondent.

SANDERSON, J.—This is an action of ejectment. The trial was by a jury. The verdict was for the defendant. The plaintiff moved for a new trial upon two grounds: 1st. Insufficiency of the evidence. 2d. Errors in law committed by the court, while instructing the jury. The motion was denied, and we are asked to reverse the order, and grant a new trial.

We do not consider either ground sufficiently sustained by the record to make its discussion profitable. On the first ground the case is one in which the jury might have found either way, without becoming obnoxious to the charge of passion, prejudice, misconception or caprice, and is, therefore, eminently a case in which this court will not disturb the verdict: Rice v. Cunningham, 29 Cal. 492. On the second ground we find no error in the instructions of the court upon the question of estoppel.

Order denying new trial affirmed, and ordered that the remittitur issue forthwith.

We concur: Crockett, J.; Sprague, J.; Sawyer, C. J.; Rhodes, J.

ADOLPH MULLER, Respondent, v. ROBERT ROGERS et al., Appellants.

No. 1546; October 6, 1868.

**Carrier—Damages to Goods.—In the Trial of a Case against alleged bailees to recover for damage claimed to have happened to goods of the plaintiff intrusted to defendants for transit, a verdict for the plaintiff after he, by his own testimony, as well as other evidence, has proved that the contract of shipment was made by him with the defendants as agents, he knowing them to be such at the time, cannot be sustained.**

APPEAL from Fourth Judicial District, San Francisco County.

Jarboe & Harrison for respondent; S. V. Smith for appellants.

SAWYER, C. J.—The action is to recover damages for injuries during the transit to two bales of furs, which plaintiff alleges that defendants agreed to carry from San Francisco to Hamburg.

The only serious question in the case is, whether the evidence is sufficient to show a contract, on their own account, by the defendants, to carry the goods. The plaintiff, himself, in his testimony, says: "Defendants are the agents of the West India and Pacific Steamship Company, Limited; I knew it, when I shipped these goods; I acted with them as such agents." There is nothing in this evidence in any degree in conflict with this testimony of the plaintiff. There is other testimony tending strongly to show that defendants acted in the making of a contract to carry the goods, but it does not purport to state the character in which they acted, whether as principals, or agents. There is other testimony tending to show that they were commission merchants only, and had no interest, as owners, in any of the companies which actually took part in the carriage of the goods, and that they were, in fact, acting as agents of the West India and Pacific Steamship Company. But when the plaintiff on cross-examination comes to state the character in which defendants contracted, he says they were agents; that he knew it when he shipped

the goods, and he "acted with them as such agents." Upon his own uncontradicted statement of the character in which he dealt with the defendants in the transaction, that is, as agents, we do not see how the jury could properly find that they contracted as principals, and they must have so found, or the verdict would necessarily, on the evidence, have been for defendants. If they contracted in the character of agents of the West India and Pacific Steamship Company, with the knowledge of plaintiff, the contract was the contract of the company, and not of defendants, and the company is the party liable. As the evidence is all one way on this point, the verdict cannot be sustained.

The judgment and order denying a new trial must be reversed on the ground indicated, and a new trial had; and it is so ordered, and remittitur directed to issue forthwith.

We concur: Sanderson, J.; Sprague, J.; Crockett, J.; Rhodes, J.

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J. Y. SAVIERS, Appellant, v. RICHARD BARNETT, Respondent.

No. 1652; October 23, 1868.

**Specific Performance.—A Naked Claim That a Person had Taken Possession of Government Land** before it became subject to pre-emption, and had surrendered it to another at the latter's request and on his verbal promise to take all the steps necessary for the acquisition of a lawful title from the government, after which the second person was to execute a note to the first for a sum of money and a mortgage on the land to secure the note, is not sufficient to enable such first person to have a court of equity decree, in a suit for specific performance, that the second person execute the note and mortgage, such second person having acquired the lawful title from the government.

APPEAL from Tenth Judicial District, Sutter County.

L. J. Ashford and F. L. Hatch for appellant; Wyatt & Stabler for respondent.

SAWYER, C. J.—No points or briefs have been filed, and we might affirm the judgment for that reason, without looking into the record. But the respondents having filed a brief,

we have examined the record, and we are satisfied that the judgment should be affirmed upon the merits.

The complaint alleges that the plaintiff was in possession of one hundred and forty acres of the public lands of the United States, at the time, not subject to pre-emption under the laws of the United States; that defendant was desirous of being in a position to pre-empt said land, when it should become subject to pre-emption and entry; that to that end it was agreed between plaintiff and defendant that plaintiff should sell and deliver his said possession to defendant, and defendant should take and hold possession, and as soon as said land should be surveyed and open to pre-emption, should file his declaratory statement, and thereafter, at his own cost and expenses follow up the proceedings as required by the laws of the United States, and procure a patent therefor, and after filing such declaratory statement, execute and deliver to said plaintiff his promissory notes to the amount of one thousand dollars, payable in gold coin one year after the date of filing such statement, together with a mortgage upon a portion of the said lands to secure the said notes; that plaintiff delivered, and defendant took possession in pursuance of such agreement, and defendant filed said declaratory statement, but afterward abandoned said pre-emption claims, and filed a homestead claim in pursuance of the laws of the United States with a view of securing a homestead right in said lands; that defendant refuses to execute said notes and mortgage, and to pay said sum; that he is insolvent, and has no means out of which payment could be enforced other than said land, and that the homestead claim was made so that the same should be exempt from execution. He prays judgment that defendant be required to specifically perform by executing said note and mortgage, in pursuance of said agreement. The agreement must be regarded under the allegations of the complaint as verbal. The court sustained a demurrer, and entered final judgment dismissing the complaint, from which the appeal is taken.

The facts stated do not present a case for specific performance within the principles established in equity jurisprudence. We find no error in the record.

Judgment affirmed and remittitur directed to issue forthwith.

We concur: Sprague, J.; Crockett, J.; Rhodes, J.

WILLIAM EWING, Respondent, v. JOHN ANDERSON, Appellant.

No. 1400; December 1, 1868.

**Forcible Entry and Detainer.—On Appeal from a Judgment** for plaintiff in a forcible entry and detainer case, the judgment should be affirmed if the evidence is considered to have been sufficient to sustain the court's findings of peaceable possession by the plaintiff, forcible entry by the defendant during plaintiff's temporary absence, breaking in by the defendant of the doors and windows of the building on the premises, expulsion of the plaintiff from the latter by the defendant, that defendant continued to withhold the premises from the plaintiff by means of threats, etc., and that the defendant's entry was without color of right.

APPEAL from County Court, Solano County.

L. C. Hayes & Wm. Ewing for respondent; McKenna & Lamont for appellant.

SAWYER, C. J.—This is an action under the forcible entry and detainer act of 1866. Plaintiff had judgment; and the only question is, whether the evidence is sufficient to justify the court in finding a forcible entry and detainer within the meaning of that act. The court found that plaintiff was in the peaceable possession of the premises; that while so in possession the defendant, in the absence of plaintiff, entered into possession with force, broke open the doors of the house situate thereon, and expelled the plaintiff therefrom; that he continued to withhold with threats; that his entry was without color of right.

We think the evidence clearly sufficient to sustain all the findings necessary to support the judgment, and that they constitute a forcible entry and detainer under the act: Minturn v. Burr, 16 Cal. 109, and 20 Cal. 48; McEvoy v. Igo, 27 Cal. 375.

The judgment is affirmed, and remittitur directed to issue forthwith.

We concur: Sprague, J.; Rhodes, J.; Sanderson, J.; Crockett, J.

HENRY BLYTHE et al., Respondents, v. A. E. HAMMOND et al., and MEYERBACK et al., Interveners.

No. 1345; December 23, 1868.

**Mechanics' Lien—Attachment Lien by Intervener.**—In a proceeding to establish mechanics' and other liens, an attachment lien claim set up by an intervener's petition cannot be considered on appeal, if the evidence, as found in the record, fails to show any writ of attachment ever to have been issued or served in such a manner as to create a lien on the fund.

**Mechanics' Lien—Attachment Lien.**—In a Proceeding to Establish mechanics' and other liens, an attachment lien claim on the fund, set up for the first time at the trial before the referee and not mentioned in any petition by claimant in the cause, is properly rejected.

APPEAL from Fifteenth Judicial District, San Francisco County.

E. B. Mastick and J. C. Cary for respondents; James McCabe for Interveners.

SPRAGUE, J.—The record discloses no error prejudicial to appellants, as each of appellants, except Phelan, by his petition of intervention and answer, claims a mechanic's lien only, and on the trial each failed to establish the same. Meyerback's offer to establish on the trial before the referee an attachment lien upon the fund due from the employer to the contractor was properly rejected as no such claim was set up in his petition. Phelan's intervention sets up a claim upon the fund due the contractor from the employer by virtue of an attachment lien, but his evidence, as found in the record, fails to show that any writ of attachment was ever properly issued or served in a manner to create a lien upon such fund.

Appellants, therefore, having failed to establish a valid lien upon the structure or money due from the owner to the original contractor, are not either of them in a position, as disclosed by the record, to be injuriously affected by the decree in favor of Blythe and Wetherbee.

If the interveners had any valid attachment liens upon the money due from the owner to the original contractor we can perceive no rational objection to an assertion of the same by

proper petition of intervention in this proceeding as against plaintiffs or any other parties to the suit claiming an interest in the fund. Although this is a statutory proceeding, it is in the nature of a chancery proceeding in a court of general jurisdiction, hence the reasoning of the court in Van Winkle v. Stow, 23 Cal. 457, does not apply. That was a special proceeding in the county court under the mechanic's lien law of 1861. This is a proceeding in the district court under the statute of 1862. With such an assertion of interest in the fund due the original contractor sustained by evidence, the interveners, appellants, in this case would have occupied a position to contest the validity of plaintiff's claim to any portion of the same as against them. But the record failing to place either of the appellants in that position, an examination of their objections to the validity of plaintiff's lien, however well taken, would result in no benefit to them.

Judgment affirmed.

We concur: Crockett, J.; Rhodes, J.

SAWYER, C. J.—I concur in the judgment on the grounds stated in the opinion of my associate. But as it is not necessary to the decision, I neither express nor intimate an opinion, as to whether a creditor of the contractor, who has attached in the hands of the owner the money due the contractor, is entitled to intervene in an action brought by a subcontractor to enforce a mechanic's lien to the extent of the contract price unpaid.

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## CALEB DORSEY, Appellant, v. TUOLUMNE COUNTY, Respondent.

No. 1900; January 7, 1869.

**County.—The Presentation of a Claim Duly Verified is an essential prerequisite to the maintenance of an action against a county, and unless the fact of such presentation appears in the complaint in any such action the complaint fails as insufficient.**

APPEAL from Fifth Judicial District, Tuolumne County.

Caleb Dorsey for appellant; Wm. L. Dudley for respondent.

SAWYER, C. J.—Section 24 of the act to create a board of supervisors, as amended 1866 (Stats. 1866, p. 836), provides that, "No person shall sue a county in any case, or for any demand unless he or she shall first present his or her claim or demand to the board of supervisors for allowance," and further "That no account or claim against a county, nor any part thereof shall be allowed by the board unless such claim, itemized and properly verified, be presented," etc. The presentation of a claim duly verified is an essential prerequisite to the maintenance of an action, and unless this fact appears in the complaint, the complaint fails to state a cause of action against a county. In the present case no such averment is found, and the demurrer was properly sustained on that ground.

Judgment affirmed, and the remittitur directed to issue forthwith.

We concur: Rhodes, J.; Sprague, J.; Crockett, J.

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JAMES J. DORLAN, Respondent, v. SAN FRANCISCO & SAN JOSE R. R. CO., Appellant.

No. 1660; January 11, 1869.

**Appeal.—Where There has Been Conflicting Evidence at the trial,** the findings of the trial court are not to be interfered with on appeal.

**Railroad—Embankment—Injury to Adjoining Proprietors.—The** right of a railroad company to erect an embankment along its line is coupled by law with the condition that it shall take reasonable precautions against doing an unnecessary damage to adjoining property holders.

APPEAL from Twelfth Judicial District, San Francisco County.

A. Teague for respondent; C. N. Fox for appellant.

CROCKETT, J.—We cannot disturb the decision and judgment of the district court, on the ground that there was no

proof of damage to the plaintiff, or that the damages were excessive. In the most favorable view for the defendant of the proofs in the cause, the evidence as to damages was conflicting, and in such cases we do not interfere with the action of the court below.

The only remaining point made by the appellant is, that the injury which the plaintiff suffered, if any, was damnum absque injuria. The argument of counsel is, that the defendant, in constructing its railroad, found it to be necessary to throw up an embankment in front of the plaintiff's property, and if the work was skillfully and carefully done, the defendant is not liable for the damage to the plaintiff in flooding his land, even though the injury was the natural or necessary result of the embankment. In other words, the proposition is, that the defendant had the lawful right to construct its railroad where it did; and that if it performed the work in a skillful and proper manner it is not liable for any damage caused to the plaintiff by the flooding of his land, in consequence of a necessary embankment. Without stopping to inquire into the soundness of this proposition, it is sufficient to say that the facts do not support the counsel's theory. It was proved that the embankment was properly constructed and was necessary in building the road; but it was not proved that the defendant took suitable precaution, by providing proper and sufficient culverts, to avoid overflowing the plaintiff's land. On the contrary, Easton, the county surveyor, who was the chief witness examined on this point, testified that if proper culverts and ditches had been made, the overflow might have been avoided; and Ames, the only witness for the defense, testified that, in his opinion, "if there was a culvert made on the main street, it would obviate the difficulty." If it be conceded, then, that the defendant had the right to erect the embankment, this right was coupled with the condition that it should take all reasonable precaution against doing an unnecessary damage to the adjoining property. If, in despite of these precautions, damage had resulted, the case would have been what the counsel erroneously assumes this case to be; but the legal proposition which he invokes is not applicable to the facts disclosed on the trial.

Judgment affirmed and remittitur ordered to issue forthwith.

We concur: Sawyer, C. J.; Sprague, J.; Rhodes, J.; Sanderson, J.

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PEOPLE, Respondent, v. DAVID G. GORDON, Appellant.

No. 1773; January 12, 1869.

**Trial.—An Instruction may not have Such Material Words Severed from it as "in pursuance of such design," and urged then in the mutilated form as error.**

**Trial—Reading Medical Books to Jury.—For counsel to read to the jury passages from a medical work is or is not error according to what are the passages and for what purpose read.**

APPEAL from Seventh Judicial District, Solano County.

Attorney General for respondent; J. W. Coffroth and W. S. Wells, for appellant.

SAWYER, C. J.—There is clearly no error in the instructions upon which the first point is made in appellant's brief. If there would otherwise be any force in the argument of counsel, it entirely ignores the clause, "in pursuance of said design."

The authorities cited by appellant in support of the second point (People v. Milgate, 5 Cal. 129, and Commonwealth v. Rogers, 7 Met. (Mass.) 504, 506, 41 Am. Dec. 458) are expressly and squarely against him on the precise point. People v. Milgate was expressly affirmed on the same point in People v. Stonecifer, 6 Cal. 410, and the point was ruled in the same way in People v. Meyers, 20 Cal. 519, and approved in People v. Coffman, 24 Cal. 236.

During the argument of the case the district attorney read passages from certain medical works, against the objection of defendant's counsel, and this is the basis of the only other point made in appellant's brief. In Commonwealth v. Wilson, 1 Gray (Mass.), 338, and Collier v. Simpson, 5 Car. &

P. 74, it was held that medical works could not be read as evidence. It does not appear in this case what was read, or for what purpose the passages were read during the argument. Without knowing either the matter read, or the object for which it was used, we cannot say there was error. Error must be made to affirmatively appear. The presumptions are in favor of the correct action of the court below.

Judgment affirmed, and remittitur directed to issue forthwith.

We concur: Rhodes, J.; Crockett, J.; Sprague, J.

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## CENTRAL PACIFIC RAILROAD COMPANY, Petitioner, v. BOARD OF EQUALIZATION OF PLACER COUNTY, Respondent.

No. 1816; February 27, 1869.

**Certiorari.—The Office of the Writ of Certiorari is to remove** for review final adjudications of inferior tribunals, etc., exercising judicial functions, when such tribunals have exceeded their jurisdiction and the party aggrieved has no appeal and no plain, speedy and appropriate remedy.

**Certiorari—When not Available.—When It is Found by the Court** issuing a writ of certiorari that the inferior tribunal had jurisdiction of the subject matter and of the parties, and that the adjudication was not in excess of the authority conferred upon it by law, the adjudication will not be disturbed because error, either of law or of fact, intervened in the proceedings.

**Taxation.—The Board of Equalization has Authority,** upon a proper application or petition, to increase or diminish the valuation of property listed and returned by the assessor.

**Taxation—Board of Equalization.—In Ascertaining and Determining** the proper valuation of property for purposes of taxation, the board of equalization acts in a judicial capacity.

**Certiorari—Questions of Error.—When It is Conceded or Shown** that an inferior tribunal had power to hear and determine the subject matter in controversy between the parties before it, and that the determination was within the law as to amount, time, place, etc., the only question that can arise upon the proceedings is one of error, which question is not before the court under the writ of certiorari.

APPEAL from Fourteenth Judicial District, Placer County.

E. B. Crocker and R. Robinson for petitioner; E. S. Craig for respondent.

RHODES, J.—The Central Pacific Railroad Company filed its petition with the board of equalization of Placer county for the reduction of the valuation of its railroad from twelve thousand dollars per mile, the rate at which it was valued by the assessor, to the sum of six thousand dollars per mile. Upon the day appointed for the hearing of the petition the counsel for the company and the district attorney for the county appeared, and both parties introduced evidence upon the question of the value of the railroad, and the matter being finally submitted, the board refused to reduce the valuation. The company thereafter filed its petition in this court for a writ of certiorari to bring up for review the proceedings of the board.

The board of equalization has authority, upon a proper application or petition, to increase or diminish the valuation of property listed and returned by the assessor. In ascertaining and determining the proper valuation of the property for the purpose of taxation the board acts in a judicial capacity. It hears and determines the matter in the same manner as a similar question is heard and determined by any other judicial tribunal. Evidence is adduced by the parties, in relation to the value of the property, and upon such evidence the valuation for revenue purposes is determined. It is not doubted by counsel, and there is no room for doubt, that on that petition the board had jurisdiction of the issue presented, and had competent authority after hearing the evidence to determine thereupon whether the valuation of the petitioner's railroad should be reduced below that made by the assessor; but it is insisted that the board, in basing its estimate of the value of the road upon its business and income—instead of taking for that purpose the value of the roadbed, as so much land, and of the superstructure, less the cost of laying the track, and the wear and tear of the materials by use—proceeded upon a wrong principle; and that the board, in basing

its estimate of value upon the business and income of the road, exceeded its jurisdiction.

The office of the writ of certiorari is to remove for review final adjudications of inferior tribunals, etc., exercising judicial functions, which have exceeded their jurisdiction, when there is no appeal nor any plain, speedy and adequate remedy: Practice Act, sec. 456. Upon a review of the proceedings of such tribunal the only inquiry is, whether it exceeded its jurisdiction; or, as it is expressed in section 462, and which means the same thing, whether it "has regularly pursued the authority of such tribunal": People v. Burney, 29 Cal. 459; Finch v. Tehama County, 29 Cal. 455; People v. Dwinelle, 29 Cal. 683; People v. Johnson, 30 Cal. 101.

When it is found by the court issuing the writ that the inferior tribunal had jurisdiction of the subject matter and of the parties—if there were parties to the proceeding—and that the adjudication was not in excess of the authority conferred upon it by law, the adjudication will not be disturbed because error, either of law or of fact, intervened in the proceedings. A certiorari is not a substitute for an appeal. Error in the proceedings which might be sufficient ground for the reversal of the judgment or decision on appeal are disregarded on certiorari; for it is the intent of the statute that all judgments and judicial determinations from which no appeal is given shall be final and conclusive, except only upon the point of jurisdiction.

The matter of which the petitioner complains, and in which the alleged want of jurisdiction appears, is in substance that the board admitted evidence of the business and income of the railroad, and based its estimate of value of the railroad upon such evidence. The board in the exercise of its admitted jurisdiction of the matter brought before it was required to rule upon the question of the admissibility of the evidence offered by either party, and to hear and consider the evidence tending to prove the fact in issue; and if the board admitted evidence that was incompetent or for any reason illegal, or gave undue or any weight to such evidence, its action and decision was in that respect erroneous, but did not amount to more than mere error, and do not touch or relate to the question of the jurisdiction of the board of the matter in controversy. To allege that the board adopted an incorrect

test of the value of the property, or a wrong theory in that respect, is to say that the board either admitted incompetent evidence or gave undue weight to some of the evidence, or decided the matter in utter disregard of the evidence; and if those questions were subject to review, the determination would be that the board did or did not commit error. Those questions could not be reached on review, even a review authorized, until it was determined, either expressly or by implication, that the board had jurisdiction of the matter in which the alleged errors occurred. "Jurisdiction," said Mr. Justice Baldwin in State of Rhode Island v. State of Massachusetts, 12 Pet. 718 [9 L. Ed. 1257], "is the power to hear and determine the subject matter in controversy, between parties to a suit, to adjudicate or exercise any judicial power over them; the question is whether on the case before the court their action is judicial or extrajudicial, with or without the authority of law, to make a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." The power to hear and determine the subject matter in controversy between the parties being conceded or shown, and the determination being within the limits prescribed by law, as to amount, time, place, etc., the only question that can arise upon the proceedings is one of error. Questions of that character are not proper subjects of review under the writ of certiorari.

As the writ cannot, in our opinion, be maintained, the discussion of the questions whether the evidence complained of was admissible, or whether the evidence was brought up in such a manner that we could notice it, or whether the proper rule was adopted in ascertaining the value of the property, would be useless and improper, as our opinion would amount to mere obiter dicta.

Writ dismissed.

We concur: Crockett, J.; Sawyer, C. J.

I dissent: Sanderson, J.

## DANIEL C. McGLYNN, Appellant, v. THE CENTRAL R. R. CO., Respondent.

No. 1721; March 1, 1869.

**Railroad.—A Contract for Railroad Construction is not to be interpreted in such a way as to make the contractor receive for the most difficult and expensive part of the work less pay than for the less expensive part.**

APPEAL from Fifteenth Judicial District, San Francisco County.

Doyle & Barber for appellant; A. J. Gunnison for respondent.

CROCKETT, J.—The principal question arising on this appeal involves the construction of several clauses of a written contract, entered into between the plaintiff and defendant, whereby the plaintiff undertook to construct for the defendant a railroad track in San Francisco, with the necessary curves, turnouts and crossings. The contract establishes a scale of prices at which the work is to be paid for; the amount varying according to the different materials of which the roadbed is to be composed; as, for example, if it be a single track and newly paved, the price is to be two dollars and seventy cents per lineal foot; if repaved, seventy cents per lineal foot; if new plank be used, one dollar and forty cents per lineal foot; if old plank, seventy cents per lineal foot; if macadamized, seventy-five cents per lineal foot; and with the rates correspondingly increased for a double track. The contract then contains the following clause:

"Curves of short radius, per lineal foot, $1.75; curves of long radius per lineal foot, $2.00; turnouts, crossings, etc., per lineal foot, $2.00."

In the specifications annexed to the contract and made a part of it, there occurs, under the head of "Measurement," the following clause:

"In the measurement for payments, the length of the road shall be measured on the center line of each track; and turnouts, crossings, etc., shall be measured from point to point of switch."

The plaintiff's constructions of these provisions is, that the curves, turnouts and crossings are to be paid for at the stipulated rates, to wit, one dollar and seventy-five cents per lineal foot for curves of short radius; two dollars per lineal foot for curves of long radius, and at the same rate for turnouts and crossings, in addition to the stipulated price for the ordinary track. In other words, he claims that he is entitled to be paid for the entire length of the track, at the rates stipulated therefor; and in addition thereto, for the curves, turnouts and crossings, at the prices specified in the contract. His proposition is, that the curves turnouts and crossings were simply to be an extra charge, to cover the additional cost of making them, in excess of the cost of the ordinary, straight track. The defendant, however, resists this construction of the contract, and maintains that so much of the track as is included in the curves, turnouts and crossings should not be included in the estimate as so much track and be paid for as such, but shall be paid for only as curves, turnouts and crossings, at the rates provided therefor in the contract.

The question is not free from embarrassment; but our conclusion is, that the construction put upon the contract by the plaintiff is the proper one. It needs no proof to make it plain that curves, turnouts and crossings in a railroad track enhance the cost of it considerably beyond the cost of a straight track. It is a self-evident proposition, that to make a curved track of wood and iron is more difficult and expensive than to make a straight track; and this contract contains an express provision to the effect that the "rails for long curves, crossings, turnouts, etc., are to be curved before being laid by the contractor, according to the directions of the engineer of the company, and all straightening of iron that may be deemed necessary by the engineer is to be done by the contractor."

But if the construction of the defendant were to prevail, the plaintiff might receive considerably less for curves, turnouts, and crossings than for straight tracks; the highest rate for the former being two dollars per lineal foot, whilst the latter ranges from seventy cents per lineal foot for a single track, paved with old plank or repaved with cobbles, to four

dollars and seventy-five cents per lineal foot for a double track, newly paved. It can scarcely be a reasonable and just construction of the contract which would or might award to the contractor less pay for the most expensive and difficult part of the work than he is to receive for the less expensive portions. The defendant had the right, under the contract, through its engineer, to direct how many curves, crossings, turnouts and sidetracks there should be, and also to direct with what material the different portions of the roadbed should be paved. If he had required a great number of curves, turnouts and crossings, and had directed them to be paved with the most expensive material specified in the contract, as he had a right to do, it is evident the contractor, on the theory of the defendant's counsel, would have been entitled to demand, for a large portion of the work which was the most expensive, less than he was to be paid for other portions, which were less expensive. We are satisfied, on the face of the contract, that the parties to it contemplated nothing of the kind. On the contrary, the specification in respect to measurement distinctly rebuts the defendant's theory. It provides that "in the measurement for payments, the length of road shall be measured on the center line of each track; and turnouts, crossings, etc., shall be measured from point to point of switch."

Why measure on the center line, instead of the side of the track, unless it be to ascertain the number of lineal feet in the curves? On the straight track, the side line and center line would precisely correspond; but on the curves, the center line would give the precise average of the two side lines; and hence that mode was adopted, in order to ascertain how many lineal feet there were in the entire road, including the curves, and thereby raising a strong presumption that it was all to be paid for as track, exclusive of the extra cost of curves, turnouts and crossings.

In the view we take of the case, it is not necessary for us to decide the other questions which arose at the trial; and inasmuch as the special verdict of the jury affords all the requisite data for a proper judgment, the judgment of the district court is reversed, and the cause remanded, and the district court is ordered to enter a judgment for the plaintiff, in pursuance of the special verdict of the jury.

We concur: Sawyer, C. J.; Rhodes, J.; Sprague, J.

## In the Matter of the Estate of CHARLES H. S. WILLIAMS, Deceased.

No. 1835; March 12, 1869.

**Administration—Sale of Land in Parcels.**—Where a sale of real property is authorized in the settlement of an estate, the property is to be sold as a whole if it is evident it cannot be sold in parcels without detriment to the estate.

**Administration—Appraisement—Worthless Claims.**—Claims due an estate and reported as worthless by the appraisers must be deemed to be of no value until the contrary appears.

APPEAL from Probate Court, San Francisco County.

H. E. Highton for appellant; Churchill for respondents.

CROCKETT, J.—We discover no error in the order of the probate court directing a sale of the real estate of the deceased. The debts proved and allowed against the estate amount to thirty-nine thousand five hundred and three dollars and eight cents; in addition to which there is due for the family allowance three thousand eight hundred and sixty dollars, and for expenses of administration already accrued, the sum of seven hundred and twelve dollars and ninety-eight cents; making in the aggregate the sum of forty-four thousand three hundred and seventy-five dollars and ninety-eight cents, to be paid, together with the future expenses of administration, estimated at four thousand five hundred dollars. To meet these demands, there is personal property in Sonoma county, valued at twenty-two thousand two hundred and forty-three dollars and fifty-six cents; other personal property valued at seven thousand six hundred and fifty-seven dollars and thirty-eight cents, from which, however, is to be deducted four thousand dollars, the value of wines in New York which have not come to the hands of the administrator; two thousand dollars, the net value of the vintage of 1867, and eight hundred and seventy-eight dollars, the value of yet other available property in the hands of the administrator. The aggregate of these sums, after deducting four thousand dollars for the wines in New York, is twenty-eight thousand

seven hundred and seventy-eight dollars and ninety-four cents; leaving a deficiency of fifteen thousand five hundred and ninety-seven dollars and four cents in the amount necessary to pay the existing indebtedness; to say nothing of the accruing expenses of administration, which will evidently amount to a considerable sum. The real estate consists wholly of a valuable vineyard in Sonoma county, with expensive buildings for wine-making; and it is evident the property could not be sold in parcels without great detriment to the estate. In such cases, section 161 of the Probate Act authorizes the whole to be sold; and in this case the probate court very properly exercised its discretion in that respect.

Prima facie, the large amount of claims due to the estate, which are reported by the appraisers to be worthless, must be deemed to be of no value, until the contrary appears, and there was no proof to the contrary.

The order of the probate court is affirmed, and the remittitur ordered to issue forthwith.

We concur: Sawyer, C. J.; Rhodes, J.; Sanderson, J.; Sprague, J.

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MENDEL PINCUS, Respondent, v. S. AARON et al., Appellants.

No. 1759; March 12, 1869.

**Trial—Verdict.—When the Evidence** has been conflicting, the verdict of the jury is allowed to stand as correct.

**Bills and Notes—Waiver of Presentation and Protest.**—When all the circumstances go to prove that one who became the indorser of a note did so for the express purpose of having an extension given the maker for payment, that he knew the note would not be paid at maturity, which, counting the three days grace, would be four days after date, and that none of the parties contemplated a presentation formally on the day of maturity, there is shown by such circumstances that when indorsing the note the person concerned, by implication at least, waived presentation, notice and protest.

**Bills and Notes—Failure to Present—Promise by Indorser.**—An indorser of a note who, after its maturity, has full notice that it has not been presented for payment, nor protested for nonpayment, and with such notice has promised to pay the note, is bound by the promise.

APPEAL from Twelfth Judicial District, San Francisco County.

R. C. Harrison, for respondent; G. F. & W. H. Sharp, for appellants.

CROCKETT, J.—On the 21st of June, 1865, the defendants Aaron & Bro., made their promissory note for two thousand one hundred dollars, payable to the plaintiff one day after date, with interest from date, until paid. The defendant Rosenberg indorsed the note, before its delivery to the plaintiff, with the intent to become bound as guarantor for the debt. When the note matured and became payable, there was no demand on the makers for payment, nor any protest for nonpayment, nor formal notice to Rosenberg that the note remained unpaid. In order to excuse the want of demand, protest, notice, the complaint avers in substance, that the note was given to secure an antecedent debt due from Aaron & Bro. to the plaintiff; that Aaron & Bro. desired an extension of the time for payment; and Rosenberg agreed, if the plaintiff would extend the time, he would indorse their note for the amount, payable at a future day; to which arrangement the plaintiff consented, and thereupon the note was made, executed, indorsed and delivered; that at the date of the note and when it matured, Aaron & Bro. were nonresidents of this state; that the note was made, indorsed and delivered on the day of its date in the city of San Francisco, by one of the members of the firm of Aaron & Bro., who was then on his way to Montana Territory, where he resided, and who left for his home on the afternoon of the same day; that the other member of that firm has not resided in this state at any time since the making of the note, and neither the firm or either member of it had then or at any time since any place of business in this state; that when Rosenberg indorsed the note, he knew all the foregoing facts, and that S. Aaron, who made the note on behalf of his firm, intended to leave for Montana on that day, and he knew that he did in fact leave that afternoon, and that it would be impossible for the plaintiff to demand payment of the makers on the day the note matured; that Rosenberg, both at the time he indorsed the note and after its maturity, waived

the demand of payment, protest and notice; and after the maturity of the note, promised to pay it.

The answer of Rosenberg denies all the material averments of the complaint, except the making, indorsement and delivery of the note; and claims that he is released as guarantor, for want of demand, protest and notice. The cause was tried by the court without a jury; but there were no findings; and after hearing the proofs, the court entered judgment against Rosenberg, who moved for a new trial, on the ground that the evidence was insufficient to justify the decision and judgment. The motion was denied and he has appealed. We need not repeat (what we have already so often decided) that when the evidence is conflicting we will not disturb a verdict, finding or decision, on the ground that it is not supported by the evidence. It only remains for us to inquire whether there was any evidence tending to support the judgment. In order to excuse the want of demand, protest and notice, it was incumbent on the plaintiff to aver and prove, either a previous waiver by the indorser, or a subsequent promise by him to pay, after notice of the laches of the holder. In this case there was not only testimony tending to prove both propositions, but, in our opinion, the weight of the evidence supports the judgment. From all the proofs, considered as a whole, we are satisfied it was fully understood when Rosenberg indorsed the note that considerable indulgence was to be extended by the plaintiff to Aaron & Bro.; and that Rosenberg consented to indorse it for the express purpose of procuring the extension. It is equally apparent that none of the parties contemplated that the note was to be presented for payment four days thereafter; or that notice of nonpayment should be given to Rosenberg, who must have known, we think, when he indorsed it, that it would not be paid at maturity. All the circumstances tend to prove at least an implied waiver at the time of the indorsement.

We think it is equally apparent that he had full notice, after the maturity of the note, that it had not been presented to the makers for payment, nor protested for nonpayment, and that with this knowledge he promised to pay it. If there had been no previous waiver, his subsequent promise to pay would bind him, under these circumstances: Keys v. Fenstermaker, 24 Cal. 330.

Judgment affirmed and remittitur directed to issue forthwith.

We concur: Sawyer, C. J.; Rhodes, J.; Sanderson, J.; Sprague, J.

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JOSEPH S. PAXSON, Petitioner, v. HENRY M. HALE, Auditor, Respondent.

No. 1514; November 29, 1867.

**Fund Commissioners—Salaries.—The Provision in Statutes of 1861, section 1, page 554, making the salaries of fund commissioners "full compensation for all official services required of them by law," refers to services of such persons as officers of the city government, and not as fund commissioners.**

Mandamus from San Francisco County.

Haight & Temple for petitioner.

For other opinions in this case, see next page.

SANDERSON, J.—The offices of treasurer and fund commissioner, though held by the same person, are so distinct and separate as they would be if held by different persons. The duties are separate and distinct and the same is true of the salaries annexed: Stats. 1855, p. 285, sec. 6. The statute creating the board of fund commissioners and fixing the compensation for their services is wholly unaffected by the subsequent legislation fixing their salaries as officers of the city government. The provision that their salaries, as officers of the city government, "shall be full compensation for all official services required of them by law" (Stats. 1861, p. 554, sec. 1), refers to their services as such officers and not as members of the board of fund commissioners.

Let a peremptory writ of mandamus issue.

We concur: Shafter, J.; Sawyer, J.; Currey, C. J.

JOSEPH S. PAXSON, Petitioner, v. HENRY M. HALE, Auditor, Respondent.

No. 1514; April 5, 1869.

SANDERSON, J.—We rendered a judgment in this case at the October term, 1867; but, it having been claimed on the part of the defendant that the case had been taken up before the time for filing his closing brief had expired, we set the judgment aside upon his motion. Since then his brief has come in, and we have again considered the case. Our conclusion is the same as at first, and the writ must go for the reasons stated in our former opinion.

Let a peremptory mandamus issue, according to the prayer of the petitioner.

We concur: Sprague, J.; Crockett, J.

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JOSEPH S. PAXSON, Petitioner, v. HENRY M. HALE, Auditor.

No. 1514.

**Municipal Corporations—Allowance of Claims.—The Auditor** of San Francisco must, before allowing a claim, satisfy himself not only that "the money is legally due and remains unpaid," but also that "the payment thereof from the treasury of the city and county is authorized by law, and out of what fund."

**Municipal Corporations—Salary of Fund Commissioners.**—Unless the provision in Statutes of 1861, section 1, page 554, making the salaries of fund commissioners "full compensation for all official services required of them by law" refers to services not merely ex officio, there is no authority for these commissioners to be paid at all.

Mandamus from San Francisco County.

Haight & Temple for petitioner.

See preceding case.

SAWYER, C. J.—The petitioner, Paxson, is treasurer, and ex officio one of the fund commissioners of the city and county of San Francisco, under the act of 1855. He asks for a peremptory mandate to require the respondent, who is auditor of said city and county, to audit and allow a claim for salary, as one of said fund commissioners under said act. which provides that the said commissioners shall receive twelve hundred dollars each per annum for their services as such funding commissioners.

Whatever the rights of the petitioner might have been under this act, had not the Consolidation Act been subsequently passed, we do not see how he can be entitled to the writ sought, in view of the provisions of the eleventh, eighty-second and eighty-fourth sections of that act. The eighty-second section provides in express terms that: "No payment can be made from the treasury, or out of the public funds of said city and county unless the same be specifically authorized by this act." It is not pretended, as we understand counsel, that the salary claimed is "specifically authorized" to be paid "from the treasury, or the public funds of the city and county," by any provisions in "this act." Sundry moneys authorized to be paid by the act are specifically enumerated, but this is not one of them, unless it is embraced in the provision the "treasurer, assessor, etc., shall continue to receive for their official services, such fees and compensation as are now, or may be hereafter allowed by law." If it be conceded that this clause embraces the compensation authorized by prior acts to be paid to the party holding the office of treasurer, as salary for his services as fund commissioner, then his salary as fund commissioner is provided for in the Consolidation Act under his official name and designation of treasurer, and is authorized to be paid out of the treasury. But if provided for under this name, then the subsequent acts of 1857 and 1861, changing and limiting the compensation of the treasurer, must also be regarded as embracing under that name his compensation as fund commissioner, and there is nothing left for him to stand upon; for, by those acts, he is to receive a fixed sum, "as in this act provided and not otherwise, and shall be in full compensation for all official services required of him by law": Laws 1861, p. 554, sec. 1. See, also, Laws 1857, p. 212, sec. 4. Hence the petitioner is obliged to

maintain that his salary as fund commissioner is not touched by the provision of the Consolidation Act prescribing the compensation of treasurer. But in avoiding Scylla, he falls into Charybdis, for while the salary of treasurer and other city officers is provided for, nothing is said about the salary of fund commissioners, and there is nothing in the act specifically authorizing the payment of such salaries. The claim rests upon the prior act alone. Besides, section 11 of the Consolidation Act, as it originally stood, provides that, "No fees or compensation, other than, as expressly allowed in this act, shall be received by any officer of the said city": Laws 1856, p. 148, sec. 11. And the amendment of 1857 also provides that, "No fees or compensation, to be paid out of the city and county treasury, other than as expressly allowed in this act, shall be allowed or received by any officer of said city and county": Laws 1857, p. 212, sec. 4. If the treasurer, in the character of fund commissioner, is to be regarded as holding a distinct office, he is not mentioned as such in the act, and his compensation in that character is not "expressly allowed in this act." If he is a city officer, then, within the meaning of the term as used in the act, he comes within the terms, "any officer" by whom no fees or compensation shall be received under the express provision of the act, because none is expressly allowed to him in this act, unless allowed under the name of treasurer; and if allowed under this name, as we have before seen, his salary by that name is limited to four thousand dollars. If not a city officer within the meaning of that term as used, then certainly no payment of compensation is "specifically authorized by this act," and, as we have before seen, the case falls within the prohibition of section 82. In either case the payment is prohibited.

The provisions of the Consolidation Act, being subsequent, must govern, so far as the payment of money out of the treasury is concerned, and under its provisions the claim in question cannot be paid out of the treasury, for not being specifically authorized by the provisions of the act payment is expressly prohibited. No subsequent act has been brought to our notice removing this prohibition. Under section 84, the auditor, before he can allow a claim, is not only required to satisfy himself "whether the money is legally due and remains unpaid," but also "whether the payment thereof from the

treasury of the city and county is authorized by law, and out of what fund. Now, since "no payment can be made from the treasury, or out of the public funds of said city and county, unless the same be specifically authorized by this act," and since the payment of the salary claimed is not "specifically authorized by this act," the auditor could not satisfy himself of the existence of the required facts, and he was, therefore, not authorized to audit the demand. The court will not by its mandate, compel him to do that which the law does not authorize or permit him to do.

It either must have been the intention of the legislature in passing the Consolidation Act to provide, by the terms used, compensation for all acts cast upon the various city officers by law, whether holding one office, or acting ex officio in others, or there was causus omissus in not excepting the compensation of the fund commissioners from the prohibitory clause, and authorizing the city officers to allow and pay it. If the latter is the true solution, the express prohibition nevertheless applies to it; if the former, then subsequent acts have taken away the compensation. Upon a comparison of the several sections of the Consolidation Act, we, upon the whole, think the object was to cover every charge intended to be paid out of the city treasury: People ex rel. Hunt v. Board of Supervisors, San Francisco, 28 Cal. 430.

We think the writ should be denied.

I concur: Rhodes, J.

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## HENRY A. HUBER, Respondent, v. JEREMIAH CLARKE et al., Appellants.

No. 1468; April 7, 1869.

**Deeds.—A Deed in Which the Description of the Land Errs in Respect** of locating the point of beginning, whereby confusion results from the subsequent courses given, is sufficiently explained by words following the description, such as "it being the same land described in," etc., thus subrogating the grantee to the ownership of the grantor under the deed by which the latter acquired title.

**Deeds.—In Construing Deeds With Inconsistent Calls,** when it is obvious that one of them must of necessity be a false call, evidence

aliunde is admissible to explain the error, unless it is explained by other portions of the deed.

**Reformation of Deed—Readiness of Plaintiff to Do Equity.**—In a suit for the rectification of a deed, where the error, strictly construed, reverses the ownership of the parties as to their respective tracts, the plaintiff must aver readiness and willingness to deed to the defendant as the facts call for upon the defendant's so deeding to him.

**Reformation of Deed—Parties.—To a Suit for the Rectification** of a deed to the plaintiff's grantor, made by the defendant's grantor, the plaintiff's grantor is not in all cases an indispensable party.

**Reformation of Deed—Pleading.—In a Suit Between Owners of Contiguous Parcels** of land for the correction of the deed to the plaintiff's grantor, who took from a common source with the defendant, and has not been made a party to the suit, it is unnecessary to aver in the complaint either that by means of the erroneous deed such grantor acquired legal title to no land outside of that intended to be conveyed, or that, if he did so erroneously acquire the legal title, the plaintiff was, through the subsequent conveyance to him, put into a position to restore it to the defendant; since, if the complaint describes the land, the error and the circumstances of the transaction, such an averment would be a conclusion of law.

APPEAL from Third Judicial District, Santa Clara County.

W. & S. Patterson, for respondent; Jeremiah Clarke in pro. per.

See Clarke v. Huber, 25 Cal. 593, 20 Cal. 196.

CROCKETT, J.—The material questions in this case are: 1st. Whether or not the Kochs were necessary parties to the action; 2d. Is there any equity in the plaintiff's complaint in the absence of an explicit averment that the plaintiff is ready and able to reconvey or to cause to be reconveyed to the defendant the title to the land alleged to have been erroneously included in the deed from Robles to the Kochs? 3d. If the Kochs were necessary parties, was it competent for the defendant to waive their nonjoinder as defendants, and have they done so?

In examining these questions, it becomes material to ascertain: 1st. What land, if any, was actually conveyed by Robles to the Kochs, by the deed which is alleged to have contained an erroneous description; and 2d. If any land was

thus erroneously conveyed, whether the plaintiff has succeeded to all the title which the Kochs acquired by the erroneous deed, and is in a position to restore it to the defendant.

It is not controverted that the land which the Kochs purchased and which Robles intended to convey to them, commenced at the southeast corner of the De Zaldo tract, and was to run thence southerly two thousand varas; thence westerly fourteen hundred varas; thence northerly two thousand varas, and thence easterly fourteen hundred varas, to the point of beginning, and that the tract was to be bounded on the north by the southerly line of the De Zaldo tract. The deed as actually made described the land as commencing at the northeast corner of the De Zaldo tract and as running thence southerly two thousand varas; thence westerly fourteen hundred varas; thence northerly two thousand varas and "thence easterly along the southern boundary line of said Mrs. De Zaldo's land, fourteen hundred Spanish varas to the place of beginning." The only error in the description is in designating the northeast instead of the southeast corner of the De Zaldo tract as the beginning point. Strike out northeast and insert southeast, and the deed would describe the land precisely as the parties intended it should. But it is evident two of the calls are inconsistent with each other. If the tract commenced at the northeast corner of the De Zaldo tract, it would not only include the whole of that tract of six hundred varas square, but it is impossible that the last line could run easterly "along the southern boundary line of said Mrs. De Zaldo's land." It is apparent on the face of the deed that one of these is a false call; and that a survey made under that description would not close. In construing deeds with inconsistent calls, when it is obvious that one of them must, of necessity, be a false call, evidence aliunde is admissible to explain the error, unless it is sufficiently explained by other portions of the deed. But in this case there is no contest as to which of these inconsistent calls was the false one. It is admitted that the error was in describing the beginning point as at the northeast instead of the southeast corner of the De Zaldo tract. On the face of the deed, without the aid of extrinsic facts, it would be impossible to decide what particular body of land was in-

tended to be conveyed. Standing alone and unexplained, the deed conveyed nothing by reason of the repugnancy of the calls. By force of the deed alone, with its inconsistent calls, the Kochs acquired the legal title to no land whatsoever; and certainly none to the land lying to the north of the south line of the De Zaldo tract. It being admitted that the call for the northeast instead of the southeast corner of the De Zaldo tract as the beginning point was falsa demonstratio, and that the remainder of the description was correct, it results that the Kochs acquired no title, either legal or equitable, to any land lying to the north of the southern line of the De Zaldo tract, projected westwardly. As to that land, no title ever passed from Robles to the Kochs, for the reasons already stated; and consequently there is no title in them or their vendee to be reconveyed to the defendants. It was therefore unnecessary to make the Kochs parties defendant in the action.

But even though it were conceded that, by reason of the erroneous description in the deed, the legal title to the land lying to the north of the southerly line of the De Zaldo tract projected westwardly did pass to the Kochs, we are of opinion that the title which they so acquired, if any, passed from them to the plaintiff, by their deed to him, of September 23, 1853. In that deed, after describing the land by its true description, the following clause is inserted, to wit: "being the same land conveyed to us by Jose Teodoro de Jesus Robles by deed dated the eighth day of January, A. D. 1853. Recorded in the county recorder's office of Santa Clara county in Book E of Deeds, pages 362 and 363, and described in said deed as commencing on the northeast corner of said Mrs. De Zaldo's land; this deed being intended to convey only the same premises conveyed to us by said deed from Robles." We think, on any fair and reasonable construction of this deed, and especially when interpreted in the light of the surrounding circumstances, it was obviously the intention of the parties to substitute the plaintiff to all the rights, legal or equitable, and of whatsoever nature, which the Kochs acquired under the deed from Robles. He simply stepped into their shoes, in respect not only to the land, which was intended to be conveyed by Robles, but also in respect to that, if any, which was in fact conveyed by the erroneous

description. Having thus been subrogated to all the rights of the Kochs, the plaintiff is in a condition to restore to the defendant the title, if any there be, which was erroneously conveyed to them by Robles; and for this reason also the Kochs were not necessary parties.

But the defendant insists that the plaintiff's complaint lacks the necessary averments to entitle him to relief on this theory of the case. He maintains that if the plaintiff intended to put his case on this footing, it was incumbent on him, by proper allegations in his complaint, to aver: 1st. That the Kochs, by means of the erroneous deed, acquired the legal title to no land, outside of that which was intended to be conveyed; or 2d. If they did so erroneously acquire the legal title, that they subsequently conveyed it to the plaintiff, so that he is in a condition to restore it to the defendant.

The complaint, it is true, is somewhat vague in its averments in these respects. It does not in express terms allege that the Kochs by means of the erroneous deed, acquired the legal title to no land outside of that which was intended to be conveyed; nor, on the contrary, does it aver that they did acquire such title. It is simply silent on that point. But it correctly describes the land, which was intended to be conveyed, and properly specifies the error in the deed—setting out at length the erroneous description, with its repugnant calls. It also avers the De Zaldo tract to have been a well known tract, containing six hundred varas square, and sets forth its boundaries. It further avers that before the plaintiff purchased from the Kochs, and whilst he was in treaty with them, Robles pointed out to him correctly on the ground the land which he had sold to the Kochs, and avers that on the faith of these representations he made the purchase, and took from the Kochs a deed of conveyance correctly describing the land. The complaint therefore correctly states the necessary facts to enable the court to decide upon the legal effect of the erroneous deed; and if the complaint had in terms averred its legal effect, it would only have stated a conclusion of law and not an issuable fact.

Nor does the complaint aver that the plaintiff has been subrogated to whatever right or title the Kochs acquired, by means of the erroneous deed, to other lands than those

which were intended to be conveyed; but alleges a conveyance from the Kochs to the plaintiff, by a correct description, of the land which was in fact sold and intended to be conveyed to them by Robles. There was no need for an averment that the plaintiff had been subrogated to the title of the Kochs, if any they acquired, to the other lands; because, as we have seen, it sufficiently appeared from the complaint that they acquired no title, legal or equitable, to such other lands. But even though an averment to that effect had been necessary, in order to show a proper case for equitable relief, the defendant, in his answer, has supplied the defect, by the allegation that the deed from Robles to the Kochs was inoperative in law to convey any land whatsoever; and by the further allegation, in substance, that the Kochs had conveyed to the plaintiff whatever rights, if any, they had acquired under the deed from Robles.

The defendant, however, insists that defects in the complaint cannot be supplied by admissions in the answer; and that, to entitle the plaintiff to relief, it was his duty, on discovering its defects, to have amended his complaint, so that the allegata et probata would correspond. Without intending to lay down any precise rule as a precedent in such cases, we are satisfied that, strict rules of pleading aside, when the want of a necessary averment in the complaint is supplied by an admission in the answer, we ought not to reverse the judgment and send the case back for a new trial, for the mere purpose of enabling the plaintiff to move for leave to amend his complaint, and go through the form of a new trial, which could only result in another judgment for the plaintiff, on facts admitted in the answer, and the other facts found by the court. Such a proceeding could result only in a vexatious delay and a useless expense, without benefiting the defendant.

On the former hearing of this appeal our attention was not called to the particular facts on which we have commented and which we hold to be decisive of the case. In our opinion the Kochs were not necessary parties; and the judgment must be affirmed.

So ordered.

I concur: Sprague, J.

I concur in the judgment: Sawyer, C. J.

We concur in the judgment and the reasoning of Justice Crockett, showing that the Kochs are not necessary parties, so far as it is founded upon the language of their deed to the plaintiff, which purports to convey all the rights which they acquired under their deed from Robles.

Sanderson, J.
Rhodes, J.

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JOAQUIN CARRILLO, Respondent, v. C. D. SMITH, Appellant.

No. 2039; April 9, 1869.

**New Trial—Time for Filing Statement.**—On a motion for a new trial the court or commissioner is authorized by statute to extend the time for filing the statement twenty days in addition to the five days allowed the applicant as a right.

APPEAL from Seventh Judicial District, Sonoma County.

Latimer & McCullough for respondent; A. Thomas for appellant.

SAWYER, C. J.—Under section 195 the court or commissioner is authorized to extend the time for filing statement on motion for new trial twenty days in addition to the five or ten days given by the statute. Order reversed, and cause remanded by consent of parties with directions to the district court to proceed and settle the statement and hear the motion for new trial, and remittitur ordered to issue forthwith.

We concur: Rhodes, J.; Sprague, J.; Sanderson, J.; Crockett, J.

THOMAS SEDGWICK, Jr., Respondent, v. J. M. BERRY, Appellant.

No. 1846; April 9, 1869.

**Bankruptcy—State Insolvent Law.**—Proceedings in insolvency under the state law for the relief of insolvent debtors and protection of creditors are not affected by the act of Congress of March 2, 1867, known as the Bankrupt Act.

APPEAL from Fifth Judicial District, San Joaquin County.

Montgomery & Underhill for respondent; Schell, Hewel & Budd for appellant.

SANDERSON, J.—One of the points made in this case relates to the effect of the act of Congress of the 2d of March, 1867, known as the Bankrupt Act, upon the statute of this state for the relief of insolvent debtors and protection of creditors. We have had occasion to consider that question, at the present term, in the case of Martin v. Berry [37 Cal. 208]. Under the conclusion reached in that case, the defendant's proceedings in insolvency, under the state law, were unaffected by the act of Congress, they having been commenced before that act took effect. The court below, therefore, erred in denying the motion of the defendant to quash the execution, upon the ground that his discharge under the state law was void. Our conclusion upon this point renders it unnecessary for us to consider the further question presented by the record, as to the validity of the judgment, considered by itself, upon which the execution was issued.

Order reversed, and the court below directed to quash the execution and perpetually stay the judgment.

We concur: Sawyer, C. J.; Crockett, J.; Sprague, J.; Rhodes, J.

ADOLPHUS C. WHITCOMB, Appellant, v. MARY H. HENSLEY et al., Respondents.

No. 1737; April 12, 1869.

**Ejectment—Map as Evidence.—In an Action of Ejectment where the controversy rests on the plaintiff being able to locate premises described in his muniments of title, such location must be proved by better evidence than a map purporting on its face to be a copy, not in any way authenticated, and not shown ever to have been adopted by competent authority as a map of the city in which the premises are alleged to lie.**

APPEAL from Third Judicial District, Santa Clara County.

Wm. Matthews for appellant; S. O. Houghton for respondents.

SPRAGUE, J.—Are the lands described in appellant's muniments of title, as by him offered and read in evidence on the trial, the same lands described in his complaint? seems to have been the ultimate question of fact submitted to the court below and presented on this appeal; or, in other words (there having been no evidence offered in behalf of defendant), does the evidence presented by appellant establish his title to the lands described in his complaint, or any portion thereof?

The complaint minutely describes the demanded premises by metes and bounds, locating the same as in block No. 4 of White's survey and addition to the city of San Jose, as laid down on the map of said city, and gives the abuttals of said block No. 4 as Taylor street on the north, Second street on the east, Jackson street on the south, and First street on the west. and further describes the same lands as comprising all of lots numbered 37, 38, 39, 40, 44, 45, 46, 47 and 48 in said block 4 of said White's addition to said city of San Jose, as the same are marked down on the present map of the said city of San Jose.

On the trial, as evidence of his title to the demanded premises appellant introduced and read a grant made by K. H. Dimmick, as alcalde of the Pueblo de San Jose, to Chester S.

Lyman, dated March 10, 1849, of lands described therein as follows: "All that certain piece or parcel of land lying and being in the Pueblo de San Jose in the north section of said city and known as lots No. 44, 45, 46, 47 and 48, being the east half of Block 4 of White's Survey, executed by C. S. Lyman, Esq. and now on file at the alcalde's office."

Also a grant made by K. H. Dimmick, as alcalde of the Pueblo de San Jose, to Charles White, dated March 10, 1849, of lands described therein as follows: "All that certain tract or piece of land lying and being in the Pueblo of San Jose and known as White's Survey executed by C. S. Lyman, Esq., all of Blocks one, two, three and the west half of Block four lying north of and adjoining the original town survey, bounded on the north by Washington Street and east by the east half of Block four, be the same more or less."

Also a deed of conveyance from Chester Smith Lyman to Hiram Grimes, dated May 26, 1849, of lands described as follows: "All that certain piece or parcel of land lying and being in the Pueblo de San Jose de Guadalope in the north section of said city and known as lots numbered 37, 38, 39, 40, 43, 44, 45, 46, 47, 48 in Block Number 4 of White's Survey, executed by C. S. Lyman and now on file in the Alcalde's office in said Pueblo."

Also a deed of conveyance from Charles White and wife to Hiram Grimes, dated June 6, 1849, of lands described as follows: "All that certain piece or parcel of land lying and being in the Pueblo de San Jose in the north section of said city and known on the plat of White's Survey executed by C. S. Lyman, Esq., surveyor, as lots number 37, 38, 39 and 40 in Block No. 4, each lot being fifty varas by about one hundred and fifteen deep."

Also a deed of conveyance from Hiram Grimes to appellant, dated January 31, 1863, of lands described as follows: "All that certain piece or parcel of land lying and being in the Pueblo de San Jose, Santa Clara County and State of California, in the north section of said city and known as lots number 44, 45, 46, 47, 48 and being the east half of Block 4 of White's Survey executed by C. S. Lyman and conveyed by K. H. Dimmick 1st Alcalde to Chester S. Lyman dated March 10, 1849 . . . . also all that piece or parcel of land lying and being in the Pueblo de San Jose in the north sec-

tion of said city and known on the plat of White's survey executed by C. S. Lyman, Surveyor, as lots number 37, 38, 39 and 40 in Block No. 4 each lot being fifty varas by about one hundred and fifteen deep being the four lots conveyed by Charles White and Ellen E. his wife to Hiram Grimes June 6, 1849."

No question was made upon the validity of these grants and deeds, or as to the effect of the same being to vest the legal title in appellant to the lands described in his deed from Hiram Grimes, dated January 31, 1863; and plaintiff, on the trial, after having called as witnesses the city clerk of the city of San Jose and the county recorder of the county of Santa Clara, the former of whom testified that he "had in his custody and possession, as such city clerk, all the maps, papers and records belonging to or in the possession of the city of San Jose, as the successor of the former pueblo of San Jose, and that there was no such map or survey as White's survey executed by C. S. Lyman in his custody as city clerk, and that there was in his custody no map or survey of White's survey or addition to San Jose of any description except such as appeared upon the map of the city of San Jose," hereinafter set forth.

The witness then produced a map purporting, upon its face, to be a plat of the city of San Jose with the various additions, made in the year 1850 by Thomas White, as city surveyor of said city, which said map was in the custody of the city authorities at the time witness entered upon the duties of his office, and that it was the map generally used by the inhabitants of the said city in making conveyances of lands in said city, and the map used by him, in his official capacity, as the map of said city. That there was, also, in his office another map purporting to be a map of the city of San Jose, that it was a lithographed map and was known as the Sherman Day map, which was produced by the witness.

The latter witness testified that there was but one map of the city of San Jose in his office; that that map was the one used by him, that he did not know how it came in his office, that it had no indorsement of any filing upon it. He then produced the map referred to by him, which on comparison appeared to be a lithograph copy of the Sherman Day map, and a duplicate of the map produced by the city clerk.

Both these maps were offered in evidence by plaintiff and objected to by defendant.

The Thomas White map was admitted and the Sherman Day map rejected, on the ground that it purported on its face to be a copy—was not in any manner authenticated, and had not been proved to have ever been adopted by competent authority as the map of the city.

The exact location of White's survey and block No. 4 thereon is the important preliminary fact in arriving at the ultimate facts as to the identity of the lands described in plaintiff's deed from Grimes with the lands described in his complaint.

The Thomas White map in evidence purports to be a "map of the city of San Jose surveyed and drawn by order of the common council in the year 1850 by Thomas White, city surveyor," and with its explanatory notes delineates and gives the relative locations and abuttals of the original survey of the pueblo, White's addition, the city addition, Read's addition, Cook & Branham's addition, Nagle and Sansevain's and Ruckle's additions. This map, having been made in 1850, clearly is not the map or survey referred to in the original grants of plaintiff's lands, made March 10, 1849.

From an examination of this Thomas White map and explanatory notes, White's addition, as thereon delineated, extends from Julian street on the south to Taylor street on the north, and from Ninth street on the east to the western limits of the city. The explanatory notes state that "White's addition extends from Julian Street northerly to Taylor Street"; and, although the eastern and western boundaries are not given in the explanatory notes, the same notes do locate Cook & Branham's addition from Ninth street east to red line below Sixteenth street in a position to preclude the extension of White's addition easterly beyond Ninth street, and the map does not disclose any addition or survey between White's addition and Cook & Branham's.

After the introduction of this map plaintiff called a witness, Thomas Bodley, who testified in substance that he had been a resident of San Jose since 1849, had been a practicing attorney in said city since 1850, and during that period had been extensively engaged as a conveyancer of lands in said city, and dealing in real estate therein. That there was but

one tract of land within the limits of the city of San Jose called White's survey or called White's addition, and that he knew the boundaries thereof as universally received, accepted and known among the inhabitants of said city; and then gave the boundaries of White's survey or addition, as so fixed by common understanding and report, and pointed the same out on the Thomas White map, making the northern boundary thereof Taylor street, the eastern boundary Seventh street, the southern boundary Julian street, and the western boundary First street to its junction with Market street, and from said junction to Julian street the western boundary was Market street. Witness then pointed out the lands described in plaintiff's complaint, and located the same in block 4 as laid down on the Thomas White map as the northwest corner block of White's addition, bounded by Taylor street on the north, Second street on the east, Jackson street on the south and First street on the west. Witness never had seen the original White's survey executed by Lyman, but had seen what purported to be copies of it, but had no means of knowing whether the copies were true; that his information and knowledge of the boundaries of White's survey and addition, and also the lands sued for were derived from general notoriety and reputation.

This is the substance of the entire testimony on the trial, from which it will be observed that upon the important preliminary question, as to the exact boundaries of White's survey or addition, the evidence afforded by the Thomas White map and that given by witness Thomas Bodley materially conflicts, as by the map with the explanatory notes the eastern boundary of White's addition is manifestly Ninth street, whereas the evidence of Bodley establishes the eastern boundary of White's addition by common report of the inhabitants of the city as Seventh street.

All the testimony, however, concurs in establishing the southern boundary of White's addition as Julian street and the northern boundary as Taylor street, and in locating Washington street as the next street north and parallel with Julian street, Empire street as the next street north of Washington street, Jackson street as the next north of Empire street, and the next south of Taylor street.

Appellant insists that the true location and boundaries of White's survey or addition are as stated by witness Bodley, and that the eastern boundary thereof is Seventh street, while respondent claims that the true eastern boundary is Ninth street, as evidenced by the Thomas White map. As delineated by this map, taking Seventh street as the eastern boundary of White's addition, there is but one block numbered 4 in the addition, but there are two blocks numbered 1. The block numbered 4 being the northwest corner block between Taylor and Jackson, First and Second streets, as described in plaintiff's complaint; but taking Ninth street as the eastern boundary of said addition, there are in said addition two blocks numbered 4 and two blocks numbered 1, the two blocks numbered 4 being northwest and southeast corner blocks of the addition, the southeast corner block numbered 4 being bounded on the north by Washington street, on the south by Julian street, on the east by Ninth street and on the west by Seventh street. Regarding then the location and relative position of Julian, Washington, Empire, Jackson and Taylor streets established and conceded as above stated, the grant from K. H. Dimmick to Charles White of March 10, 1849, offered in evidence by plaintiff as the foundation of his title to lots numbered 37, 38, 39 and 40 in the west half of block 4 of White's addition or survey, furnished potent evidence tending to establish the eastern boundary of White's survey or addition at Ninth street, as delineated on the Thomas White map, and conclusive evidence that the west half of block 4 in which these lots Nos. 37, 38, 39 and 40 are located, is between Julian and Washington streets, and that this block 4 is in the extreme southern tier of the blocks of White's survey, instead of the extreme northern tier, as claimed by plaintiff. The grant in plain terms defines the granted lands as adjoining the original town survey and south of Washington street, and it being conceded that Julian street is the northern boundary of the original survey or pueblo and the southern boundary of the White survey or addition, and that Washington street is the next street north of and parallel to Julian street, it follows necessarily from the terms of the grant to Charles White that all the lands conveyed by the same, including the block 4 conveyed therein, are located between Julian and Washington

streets, and are bounded on the north by Washington and on the south by Julian streets; and as in the entire range of blocks between Julian and Washington streets from the extreme western to the extreme eastern limits of the city, as delineated and marked on the map in evidence, there is found but one block numbered 4, and this block 4 is bounded north by Washington street, east by Ninth street, south by Julian street and west by Seventh street, it is manifest from the evidence disclosed by the record that the block 4 named in the grant to Charles White is bounded on the east by Ninth street; and that block being in the White survey referred to in the grant establishes the eastern boundary of White's survey or addition as far east, at least, as Ninth street. The block 4 named in the grant to Charles White being thus definitely located, by the terms of the grant, south of Washington street, and the west half of the block containing lots 37, 38, 39 and 40, to which plaintiff has shown he holds title through Charles White, the original grantee, and having by his complaint located lots 44, 45, 46, 47 and 48, the title to which he derives through C. S. Lyman, as adjoining to the aforesaid lots 37, 38, 39 and 40 and in the east half of the same block 4, and there being no evidence tending to show that block 4 named in the White grant and the block 4 in the Lyman grant are different or distinct blocks of the White survey, we are entirely satisfied that the lands to which plaintiff's evidence established his title, and every part thereof, are many blocks southeast of the lands described in his complaint, and that the evidence entirely fails to establish title in plaintiff to the demanded premises or any portion thereof. The findings of the court below, therefore, are fully sustained by the evidence. The error assigned upon the exclusion of the Sherman Day map is not tenable. As independent evidence it was clearly incompetent for want of proper authentication.

The fourth assignment of error seems to have no foundation upon which to rest. It does not appear from the record that the court excluded from consideration the evidence furnished by the Thomas White map of the city of San Jose, the only map admitted in evidence on the trial. On the contrary, the court seems to have fully considered such evidence, as it tends most strongly to sustain the findings.

Judgment and order affirmed, and remittitur directed to issue forthwith.

We concur: Rhodes, J.; Sanderson, J.; Crockett, J.; Sawyer, C. J.

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MARGARET GARRIOCH et al., Respondents, v. WILLIAM STANNER et al., Appellants.

No. 1784; April 15, 1869.

**Parties.—In an Action Affecting Real Estate** it is proper to make persons parties defendant who claim to have been in possession, and if they put in no proof at the trial to maintain the claim, it is proper for the court to conclude them by its judgment.

**Witness—Who Competent to Prove Signature.—An Official Whose Duties** have compelled a close attention by him to old records and in that connection to a particular signature is a competent witness to prove that signature, although the signatory has been long dead and was never known or seen by the witness.

APPEAL from Twelfth Judicial District, San Francisco County.

The action was ejectment against William Stanner, Bridget Stanner, Patrick Brannan, Ramon Valencia and James McCabe. Each of these filed a separate answer except the first, who defaulted. The principal defendant was Valencia, and the Stanners held under him as tenants. At the trial the plaintiffs put in evidence a grant, dated November 18, 1840, from Francisco Guerrero, then alcalde of the pueblo of San Francisco, to Candelario Valencia, and a deed, dated December 23, 1854, from the latter to Margaret Henderson, which was the maiden name of the plaintiff. One Hopkins was permitted, over the objection of the defendant, to testify to the genuineness of the signature of Guerrero, having previously admitted he had never witnessed Guerrero write or seen the man; he had said, though, that for the past ten years he had been in charge of the Spanish documents in the office of the surveyor general—was familiar with the Spanish language, and by reason of his occupation knew well this signature.

The grant itself was objected to on several grounds: 1. The absence of a showing that as a preliminary—essential under Mexican law—to the grant there had been a petition for it made by the applicant; 2. The absence of a showing that a petition of the sort had been approved by the Departmental Assembly and reported to the Supreme Government of Mexico; 3. The absence of a showing that a map, such as required in that connection by Mexican law, had accompanied the petition; 4. That the grant was void for failing to indicate the fifty vara lot in particular intended to be granted; 5. That there was no proof before the court that the judicial possession, required by that law, had been given to the grantee; 6. That the grant bore on its face conclusive evidence that the lands petitioned for, rather than other lands, had not been measured to the grantee; 7. The signature of Guerrero was merely personal, and did not import the official character of the signer; 8. The presumption of fraud that fixed itself to the issue of the grant by reason of the defects set forth. Objection was made to the admission in evidence of the deed to Margaret Henderson, the ground being that at its date there was no such person in being since the one-time person of the name had then already become Margaret Garrioch. Other points made at the trial are indicated and decided in the opinion.

I. N. Thorne for respondents; James McCabe for appellants.

SAWYER, C. J.—Neither Stanner nor his wife moved for a new trial or appealed. We have therefore nothing to do with them on this appeal.

There was no error in refusing to strike out Hopkins' testimony respecting the signature of Guerrero. Nor was there error in admitting the grant made by Guerrero, or the deed from the grantor, Candelaria Valencia, to Margaret Henderson. The other points relate to the insufficiency of the evidence in sundry specified particulars to support the findings. There is nothing to justify us in disturbing the finding on these grounds. The strongest point is that there was no possession shown on the part of McCabe and Brannan. The evidence is, that they claimed to be in possession before suit brought, and it was because of this claim on their part that

they were made parties. This was certainly enough to call upon them for an explanation of some kind, but they did not see fit to put in any evidence as to whether they were in possession or not, and we think the claim to be in possession made by them before suit, by which they induced the plaintiff to make them parties defendant, sufficient to justify the court in finding against them on that issue.

We see no error of which appellants can complain.

Judgment and order denying a new trial affirmed, and remittitur directed to issue forthwith.

We concur: Sprague, J.; Rhodes, J.; Sanderson, J.

Crockett, J., being disqualified, did not sit in this case.

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JOHN H. BAIRD et al., Respondents, v. CHARLES P. DUANE et al., Appellants.

No. 1872; June 15, 1869.

**Jury—Challenge for Cause.—Error in Refusing to** allow a challenge for cause is not prejudicial if the party, although forced thereby to use a peremptory challenge, has a peremptory challenge to spare when the jury is completed.

**Appeal—Error in Admission of Evidence.—To** show that an irrelevant question was asked is not enough on appeal; it must appear that it was answered, and how it was answered, before it can be held that incompetent or irrelevant testimony was admitted; and it is by the record that this must be made to appear.

**Trial.—The Order in Which Testimony is to be Received** is a thing entirely within the discretion of the trial court to determine.

**Evidence—Description of Land—Deed.**—In support of a complaint in which a description of land occurs, a deed may be introduced wherein the description does not correspond with the other description, provided evidence aliunde is forthcoming to show that both descriptions apply to the same land.

**Evidence.—Declarations of Parties in Possession Explanatory** of the possession are always admissible, unless for some cause they are incompetent witnesses.

**Trial—Objections to Evidence—Exceptions.—If** a ruling admitting an answer to a question over objection appears not to have been excepted to, it is presumed on appeal to have been acquiesced in.

**Witnesses—Examination.—Counsel Enjoy No Right to Take a Witness** out of the hands of opposing counsel during examination; it is only at the discretion of the court that this is allowed, and a refusal to allow it is not error.

**Trespass—Declarations of One Wrongdoer.**—On the question of a trespass all persons entering under any certain one are concluded by his declarations and statements, and these should go to the jury with appropriate instructions.

**Trial—Explanation of Purpose of Testimony.**—Testimony proper intrinsically may be improper prima facie, in which case counsel, when seeking to introduce it, may explain the purpose to the court. If by neglecting to do this he allows the court to rule it out ignorantly, he cannot complain afterward.

**Trespass.—Although the Plaintiff, in Prior Possession, is Himself a Trespasser,** the defendants are not permitted to show the fact to justify the later trespass imputed to them.

**Pleading.—If a Defendant Would Avail Himself of a Law Passed Since the joinder of issue in the case, he must file a supplemental answer.**

**Evidence—Surveys.—In an Action Involving Land, Evidence** on the part of the defendant tending to show that a survey made at his instance was an official survey may be rebutted by the plaintiff with evidence to the effect that no official survey has been made.

APPEAL from Fourth Judicial District, San Francisco County.

Wilson & Crittenden for respondents; Cook, Bennett & Owen for appellants.

SANDERSON, J.—This is an action to recover the possession of land. The case was tried with a jury. The verdict was for the plaintiffs. The defendants moved for a new trial, which was denied. The defendants have made a number of points, which we shall consider very briefly in the order in which they have been presented.

1. If the court below erred in not allowing the challenge for cause to the juror Brownstone, the error was without prejudice. He was subsequently challenged peremptorily, and the defendants were not prejudiced by being compelled to use one of their peremptory challenges in his case, for they had a peremptory challenge left after the jury had been formed and accepted.

2. Whether the court erred in overruling the defendant's objection to the questions put to the witness Byfield, as to what knowledge he had of exhibit "B"—the Gardiner survey—and how he came to employ Curry to build the fence, we are unable to determine. The statement fails to show what answers were made by the witness to either question. If the defendants were prejudiced, the prejudice came from the answers and not the questions. Without the answers of the witness, in such cases, the bill of exceptions, or statement, as the case may be, is incomplete and fatally defective. To show that an irrelevant question was asked is not enough. It must also appear that the question was not only answered, but how it was answered, before we can say that incompetent or irrelevant testimony was admitted. We have heretofore held that to render objections of this character available, the record must show that some evidence was admitted from which the law would infer injury or prejudice: People v. Graham, 21 Cal. 265; People v. White, 34 Cal. 183; Treat v. Reilly, 35 Cal. 129.

3. The deed from Moore to Byfield was properly received in evidence. If it be true, as claimed by counsel, that up to the time it was offered no proof had been made of possession or title in Moore, that circumstance constituted no valid objection to its admission. It is true that the court, in the exercise of its discretion, might have excluded the deed until after proof of the grantor's title, but the court in its discretion might also admit the deed first. The order in which testimony shall be received is always in the discretion of the court. Nor was the fact, if so, that the description in the deed did not correspond with the description in the complaint any valid objection to its admission. Although the descriptions may have been different, yet they may have described the same land, and it was competent for the plaintiffs to show by evidence aliunde that both descriptions applied to the same land: Began v. O'Reilly, 32 Cal. 11; Reamer v. Nesmith, 34 Cal. 624.

4. The objection to the admission of the deed from Smith to Byfield rests upon the same grounds, and, therefore, admits of the same answer. Without referring specially to the testimony, however, it is sufficient to say generally that there

was introduced during the trial evidence as to the titles of both grantors sufficient to justify the admission of both deeds.

5, 6, 7. These points all relate to the proof of declarations made by different parties while in possession of the land in suit. The declarations were explanatory of their possession, and tended to show that they were in under the plaintiff's grantors. Such declarations are always admissible, independent of the question whether the parties by whom they were made are themselves competent witnesses. The objections were frivolous, and ought not to be pressed in this court.

8. The answer of the witness Sweeney to the question as to the condition of the fences six weeks before the trial could have had no appreciable effect. He evidently had taken no special notice of the fence, and so stated, but were it otherwise, no exception was taken to the testimony, and counsel must, therefore, be presumed to have acquiesced in its admission: Turner v. Tuolumne County Water Co., 25 Cal. 397.

9. The objections made to the admission of the notice from Coggswell v. Schaadt that the former had sold to plaintiffs and that the latter must attorn to them, and to the question as to what Schaadt said when the notice was shown to him, are unsubstantial. The objection to the notice was the general one, that it was incompetent and irrelevant, and was grounded upon the assumption that there was no testimony in the case tending to show that Coggswell and Schaadt stood in the relation of landlord and tenant. We think there was. The answer to the question as to what Schaadt said is not given, and the objection is, therefore, so far unavailable, for reasons already given in answer to the second point.

10, 11. These points are frivolous. They relate to the right of one party to interpose and take a witness out of the hands of the other while under examination. No such right exists, except in the discretion of the court, and for the court to refuse to allow it to be done is not error.

12. The testimony of Von Schmidt as to what Ross said to him in a conversation at the house at Lake Honda was certainly competent as against Ross or his representative, Mrs. Ross. If the court erred at all in connection therewith it was in directing the jury not to consider the testimony as affecting any of the defendants except Mrs. Ross. The plaintiffs claimed that all the defendants were trespassers, and that Ross

was the pioneer, and the other defendants subsequently joined him in his raid upon their premises. This claim, on their part, was not without a substantial foundation afforded by the testimony. If the other defendants entered under Ross, they were bound by his declarations and statements, and we think the plaintiffs were entitled to go to the jury with their case upon that theory, under proper instructions from the court to the effect that the other defendants could not be affected by the statements, unless for the reason suggested.

13. The testimony of O'Keefe as to the arrangement made by him, as agent for the plaintiffs, with Ross was not hearsay. On the contrary, it was the testimony of the identical party by whom the arrangement was made. The objection to the testimony on the score that it was uncertain and indefinite as to time and as to the land, in respect to which the arrangement was made, is, if possible, still less substantial.

14. Under the circumstances in which the question as to his health, on his arrival in the state in 1860, was put to the defendant Duane while on the witness-stand, we think there was no error on the part of the court in not allowing him to answer. In the midst of his examination as to the material issues in the case his counsel abruptly asked him: "What was the condition of your health when you arrived in 1860?" Up to the time this question was asked nothing had appeared to give it pertinence. Counsel now say that it was the first of a series which they intended to ask for the purpose of explaining why Duane had neglected for two or three years after his return to the state to look after or take possession of this land. We think, with counsel, that his delay for so long a time to take any steps to obtain possession of this land, if he had any claim to it, was a circumstance calculated to cast some doubt upon the existence of such a claim, and, therefore, stood in much need of explanation. If the delay was caused by ill-health, he should have been allowed to prove it, and doubtless would have been, had counsel taken the same care to inform the court below of the object of the question which has been taken in this court. Prima facie the question was irrelevant. Counsel made no explanation, but allowed the court to rule upon it in ignorance of their object. It frequently happens that the pertinence of a question is not obvious from its terms, or, in other words, that it appears

to be irrelevant until explained by counsel. Where such is the case, counsel cannot be allowed to complain of the ruling of the court excluding the testimony until after they have explained their object, and such an explanation comes too late in this court.

15. It was not error to exclude the proceedings of the circuit court of the United States confirming her pueblo claim to the city of San Francisco. That, under the circumstances of this case, a defendant cannot defeat a recovery by proof of an outstanding title has been decided too often to admit of further question. Where both parties are trespassers, the defendant cannot obviate the consequences of his own trespass by showing that the entry of the plaintiff was also a trespass. The present possession of the defendant must yield to the prior possession of the plaintiff. "If it were otherwise," as stated by Justice Burnett in Bird v. Lisbros, 9 Cal. 5 [70 Am. Dec. 617], "and a mere trespasser upon the prior actual possession of a party could justify by showing the true title outstanding in a third person, no party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations": See, also, Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Richardson v. McNulty, 24 Cal. 339; Carleton v. Townsend, 28 Cal. 219; Hubbard v. Barry, 21 Cal. 325; Harris v. McGregor, 29 Cal. 129. The idea suggested by counsel that persons in the possession of pueblo lands are there by the license of the law and the proceedings referred to does not change the result. If we assume that they are in by license, the license is to the prior possessor, and not to a mere intruder upon his possession. The license, like the grant which is presumed in the case of mines, is to the first appropriator: Coryell v. Cain, 16 Cal. 567.

16. Assuming—a point we do not decide—that the act of Congress of the 8th of March, 1866, entitled, "An act to quiet the title to certain lands within the limits of the city of San Francisco," offered in evidence by the defendants, conferred upon the city of San Francisco something which she did not previously possess, it was properly excluded, for the reason given for the exclusion of the proceedings of the circuit court of the United States, and for the further reason that the act was passed long since the issues in this case were joined.

If the defendants claimed under it, they should have filed a supplemental answer to that effect: McMinn v. O'Connor, 27 Cal. 246; Moss v. Shear, 30 Cal. 472; Barstow v. Newman, 34 Cal. 90; Hestres v. Brennan [37 Cal. 385] and Bagley v. Ward [37 Cal. 121, 99 Am. Dec. 256], present term; Hardy v. Johnson, 1 Wall. (U. S.) 374, 17 L. Ed. 502.

17. Under this point counsel have grouped several objections interposed to evidence introduced by the plaintiffs in rebuttal of the case made by the defendants. It is claimed that the evidence was not only not responsive to the defendant's case, but would have been irrelevant and incompetent at any other stage of the trial. In our judgment counsel fail to establish the first proposition. The principal object of the testimony was to controvert the testimony of Duane to the effect that he had caused a survey of the land to be made in 1850. The testimony offered in rebuttal went to show that no official survey was made, and it is claimed that the defense had not pretended that the survey made by Duane was official, and that hence, the testimony in no particular tended to rebut or contradict the testimony of Duane in that respect. It is undoubtedly true, as stated by counsel, that Duane had not in direct terms testified to an official survey, but we think with counsel for the plaintiffs that his testimony was calculated to leave the impression upon the minds of the jury that the survey as to which he had testified was official. If so, the plaintiffs were entitled to show, if they could, that no official survey had been made. That such was the character of Duane's testimony is best shown by the following quotation from the transcript: "The witness Duane further testified that he had known Dickinson, the surveyor, before he had employed him on the night of the 3d of May, 1850, when he slept with several others on sofas in witness' house in this city; that it was in the latter part of the summer of 1850, when he employed Dickinson to survey; that he (Dickinson) was at that time connected with the city and county surveyor's office; he (Dickinson) was then a deputy of Williams M. Eddy, then the city and county surveyor; and that he (Duane) then found him (Dickinson) in Mr. Eddy's office and employed him to make the survey; that he (Dickinson) owed the witness five hundred dollars, and he (Duane) paid him one hundred dollars, in cash, besides, for

the survey; that they visited the land one day on horseback and surveyed it on the next; the survey only occupied two hours." Whether Duane intended that the jury should understand that his survey was official, and therefore of record, and therefore beyond contradiction, matters not. His language, uncontradicted, certainly admitted of such an inference, and the plaintiffs were entitled to draw it, and, by rebutting it, throw discredit upon the whole of Duane's testimony. We think the plaintiffs were entitled to rely upon the legal presumption that Dickinson, if he had been employed to make a survey under the circumstances detailed by Duane, while acting as the deputy of the city and county surveyor, would have acted in official good faith toward his principal, and would have reported the survey and accounted for the fees, and not have made the survey on unofficial or private account. To show, in view of this presumption, that Dickinson did not report the survey in accordance with the usage and custom of the office to which he belonged was to prove facts from which the plaintiffs were entitled to argue to the jury that the statement of Duane that Dickinson had made a survey was a fabrication. Taken with the further facts, which were also proved in the same connection, that the actual cost of an official survey would have been only one hundred and fifty dollars to two hundred dollars, instead of six hundred dollars, as stated by Duane, and that it would have occupied a day instead of two hours, as stated by him, and with a multitude of other circumstances disclosed by the record, to which we have neither time nor inclination to refer, a very strong case was made against the truth of the testimony given by Duane, and we have no doubt as to the right of the plaintiffs to thus attack his testimony.

18, 19. To discuss the motion for a nonsuit or the question whether the verdict is sustained by the evidence would involve the review of nearly three hundred printed pages of testimony. We have no inclination for such a task, nor do we conceive it to be our duty to engage in so profitless an undertaking. It is sufficient to say that, in our judgment, this is not a case for a nonsuit nor for setting aside the verdict for the cause assigned by counsel.

20, 21, 22. These points relate to certain instructions given upon the request of the plaintiffs. It is sufficient to say that

the record fails to show that any exception was taken by the defendants. Such being the case, they are not open to review: Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Wilkinson v. Parrott, 32 Cal. 105.

23. The instruction asked by the defendants to the effect that the plaintiffs had admitted an outstanding title, and, therefore, could not recover, was properly refused, for the very substantial reason that no such admission is shown by the record.

Judgment and order affirmed.

We concur: Crockett, J.; Sawyer, C. J.; Rhodes, J.; Sprague, J.

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## A. BASSETT, Respondent, v. L. HOLLENBECK, Appellant.

No. 1578; July 14, 1869.

**Logs and Logging—Possession of Land.—In Order to Recover the Value** of sawlogs, alleged to have been wrongfully cut and removed by the defendant from the land of the plaintiff, the plaintiff must show actual possession in himself of the land from which the logs were cut.

APPEAL from Sixteenth Judicial District, Alpine County.

Marshall & Briggs for respondent; Nathaniel Bennett for appellant.

SANDERSON, J.—This is an action to recover the value of certain sawlogs alleged to have been wrongfully cut and removed by the defendant from the land of the plaintiff. The judgment was for the plaintiff, and the defendant moved for a new trial, which was denied. The grounds of the motion were that the verdict of the jury was not sustained by the testimony, and that erroneous instructions were given and other instructions, not erroneous, were denied.

The only real contest seems to have been in relation to the plaintiff's possession of the land, from which the sawlogs were cut. It appears that the plaintiff, in company with two

or three other persons—it is impossible to determine from the record how many—undertook to acquire possession for themselves and other persons—constituting all together a company of eight—of eight quarter sections of land situated on Carson river in Alpine county—that is to say, a quarter section for each member of the company. The business of the company seems to have been the cutting of wood and timber for the Virginia market in the state of Nevada, and they sought the land for the sake only of the wood and timber which was growing upon it. The plaintiff, and the other parties with him, for themselves and the other members of the company, caused a survey to be made, embracing eight quarter sections of land, showing the external boundaries of the whole tract, and also the dividing lines of each quarter section. According to the testimony of some of the witnesses, the lines of each quarter section were "well marked," but how they were marked the testimony fails to show. Their first plan was to take up a quarter section for each member of the company under the Possessory Act of this state, and, doubtless, we are to understand by these "well marked" lines, such lines as would satisfy the calls of that statute—that is, lines so marked in the field as to be readily known and traced. They seem to have subsequently suspected, however, that the Possessory Act does not authorize the taking up of public lands by absentees for the purposes of cutting off the wood and timber, for the plaintiff makes no effort to found his possession upon that statute. They next seem to have undertaken to secure a common-law possession, and, to that end, to avail themselves of the Carson river as an inclosure on the east, and certain ridges and bluffs, connected by lines of "felled trees" or "brush-fence," on the other three sides. This inclosure, such as it was, followed the exterior lines of the whole tract of eight quarter sections—no attempt was made to inclose each or any of the quarter sections separately. Inside of this supposed inclosure a cabin and other improvements were made at a cost of about three hundred dollars, on the joint account of the company. None of the company resided upon the land, or any part of it, except when actually engaged in the business of cutting and rafting timber and wood, at which times they occupied the cabin and camps which had been erected for that purpose. The whole tract was treated as the common

possession of the whole company, and timber and wood was cut from the several quarter sections indifferently. Yet they seem to have been uncertain whether their rights were to be considered as of a common-law or statutory origin, for some sales and transfers were made in which the parties dealt with each other upon the theory that they owned separate quarter sections in severalty. And this action has been brought upon this theory; for the plaintiff, and not the company, sue, and he claims that he alone has been injured by the trespass of the defendant, for the reason that the trespass was committed upon his separate quarter sections, which had become three in number at the time the trespass was committed. Yet, for the purpose of making out an actual possession of his three quarter sections, he relies solely upon the company's inclosure of the whole eight; or, in other words, for the purpose of making out a several, actual possession in himself of three quarter sections, he relies upon the joint possession of the company of the whole eight. Can that be done? We are unable to comprehend the legal principle upon which such a course can be allowed. The company—as such—either possess the whole tract in common, or each member possesses separate quarter sections in severalty. If the former, the supposed trespass of the defendant was upon the possession of the company. Had the action been brought by the company, they could have appealed to the supposed inclosure of the whole tract, for the purpose of establishing an actual possession in themselves, but we are unable to perceive how the plaintiff can claim the benefit of the company's inclosure, in making out a several, actual possession in himself, except so far as the company's inclosure may be found to bound his quarter sections. In order to maintain the action, he must show an actual possession in himself of the land from which the logs were cut. Such a possession is not shown by the testimony of the possession of the company of a larger tract in which the land is included—on the contrary it is disproved by such testimony.

Whether the inclosure made by the company was sufficient to give them the actual possession of the land it is unnecessary to consider. It is sufficient to say that the plaintiff not only failed to show an actual possession in himself of the land from which the logs were cut, but proved the contrary,

by showing that whatever possession there was, was in the company, and not in him.

Judgment and order reversed, and a new trial granted.

We concur: Sprague, J.; Crockett, J.; Sawyer, C. J.; Rhodes, J.

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MARY SHAW, Respondent, v. THE CENTRAL PAC. R. R. CO., Appellant.

No. 1711; July 14, 1869.

**Railroad—Liability for Grading.—The Fact That One Who Grades a Street** under a contract with a city, and a railroad under a contract with the company, keeps the same men and the same teams working on both jobs, does not render the railroad company liable for damages sustained by a property holder by reason of the street work, even though the railroad and the street are side by side.

APPEAL from Sixth Judicial District, Sacramento County.

Henry Starr for respondent; E. B. Crocker and Robt. Robinson for appellant.

SANDERSON, J.—This is an action for damages done to the real estate of plaintiff by the defendant, in constructing its road upon a part of it, and by grading a street opposite to the other part.

In respect to the injury or damage done by the construction of the defendant's road, the defendant justified under the provisions of the railroad law in relation to the condemnation of private property for railroad purposes. As to the damage done by grading of the street, the defendant denied that it either did, or caused to be done, the work, by reason of which the damage was caused.

The first defense was fully sustained by the testimony, and the court so instructed the jury. Upon the other defense, however, the jury found a verdict against the defendant. A motion for a new trial was made, but denied. One of the

grounds of the motion was, that the verdict was contrary to the evidence. After a careful examination of all the testimony we are of the opinion that a new trial should have been granted upon that ground. The case shows beyond all controversy that the grading of the street was done by one Charles Crocker, under a contract with the city of Sacramento. The only evidence offered by the plaintiff, tending to connect the defendant with the grading of the street, was to the effect that the work was done by the same persons and teams by which the railroad, which passes along the side of the street, was graded. But this is explained by the fact that the railroad and the street were both graded by Crocker—the former under a contract with the defendant, the latter under a contract with the city of Sacramento. Upon the testimony we think it clear that the defendant is, in no respect, responsible for any damage which the plaintiff may have sustained, if she has sustained any for which she has a remedy by action—a point we do not decide.

Judgment and order reversed, and new trial granted.

We concur: Sprague, J.; Crockett, J.; Sawyer, C. J.; Rhodes, J.

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## EGBERT JUDSON, Appellant, v. PAUL MOLLOY, Respondent.

No. 1947; July 16, 1869.

**Writ of Possession—Appeal.—An Order Restoring one to possession of land, which is in accordance with the law as applied to the facts found by the court below, will not be disturbed on appeal.**

APPEAL from the Fourth Judicial District, San Francisco County.

Patterson, Wallace & Stow for appellant; G. F. & Wm. H. Sharp for respondent.

SANDERSON, J.—This is a motion by one dispossessed under a writ of habere facias possessionem to be restored, upon

the ground that he was in possession at the time the action was commenced, and, not having been made a party to the action, was therefore unaffected by the judgment. The only question is one of fact. The moving party presented a number of affidavits showing that he was in the actual possession, by himself or tenants, prior to and at the time of the commencement of the action. On the other side affidavits were offered showing that he entered, after the action was commenced, under or through one of the defendants. The court below found the fact in favor of the moving party, and made an order restoring him to the possession. There is nothing which would justify this court in setting aside the finding of the court below. The fact being as found, the order was in accordance with the law.

Order affirmed.

We concur: Sprague, J.; Sawyer, C. J.; Crockett, J.; Rhodes, J.

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## A. HIMMELMANN, Respondent, v. A. W. REAY et al., Appellants.

No. 1666; July 16, 1869.

**Street Improvement—Unknown Owner—Demand.**—Under the street law for San Francisco (Statutes of 1863, section 11, pages 529 and 530) the contractor is not required to seek an owner, or his agent, for the purpose of making a demand when "the name of the owner is stated as unknown" on the assessment.

**Street Assessment—Dollar Mark.—It is No Valid Objection** to the assessment list that the dollar mark does not precede the sum placed opposite the lots named as assessed; if that mark is placed before the amount in the footing of the several assessments of the different lots, it is equally significant.

APPEAL from Twelfth Judicial District, San Francisco County.

This was an action by a contractor to enforce an assessment for street work, the defendants being, as alleged, the owners

of lots 3 and 4 of one particular tract in the complaint named as affected by the improvement. The "warrant," the "assessment-roll" and the "affidavit of return" composed what, on being put in evidence at the trial, was marked "Exhibit A," and the admission of this was assigned as error by the appellants "because it does not appear it has any reference to the defendants or that any demand appears to have been made, and also that same has not been legally proved."

On the diagram attached to the assessment-roll the word "unknown" was written in the column, the top of which bore the printed words "names of owners," in connection with the numbers "3" and "4" respectively in the adjacent column set apart in like manner, and indicated as for the insertion of the assessed lots by number. Other objections, the overruling of which was assigned as error, are made sufficiently to appear in the opinion.

O. L. Lane for respondent; E. A. Lawrence for appellants.

See Himmelmann v. Reay, post, p. 615; Himmelmann v. Reay, 38 Cal. 163.

SPRAGUE, J.—Appellant's objection to the admission in evidence of the warrant, assessment-roll, diagram and return of demand is not well taken. The return shows a demand of the amount assessed upon lots numbered 3 and 4 on the assessment-roll in strict compliance with the terms of the statute, which reads as follows: "The contractor or his agent or assigns shall call upon the persons so assessed, or their agents, if they can conveniently be found, and demand payment of the amount assessed to each. . . . . Whenever the persons so assessed, or their agents, cannot conveniently be found, or whenever the name of the owner of the lot is stated as 'unknown' on the assessment, then the said contractor, or his agent or assigns shall publicly demand payment on the premises assessed": Street Law for San Francisco, Stats. 1863, sec. 11, pp. 529, 530. The premises described in the complaint—on the assessment-roll, to which the warrant and diagram were attached—appear numbered as lot 3 and lot 4, opposite to which, and in the column headed "Names of owners," is entered "unknown," so that the name of the owner of these lots is stated as "unknown" in the assessment; hence, as to

these lots, the contractor, or his assigns, holding the warrant, assessment and diagram, prepared and delivered to him by the superintendent of streets, was, by the statute, required to "publicly demand payment on the premises assessed," which the return shows he did. The case of Guerin v. Reese, 33 Cal. 295, fails to sustain appellant's exception upon this point. In that case the assessment-roll showed that the lot was assessed to M. Reese as owner, hence demand of payment was required to be made as provided in the first paragraph of section 11 above quoted. As to the mode of making demand, the contractor must be governed by the statute, and the assessment, diagram, etc., prepared and placed in his hands by the superintendent of streets; he is not required by the statute to seek an owner, or his agent, for the purpose of making demand, when "the name of the owner is stated as unknown" on the assessment. In such case the only method of making demand, to be evidenced by his return, is by public proclamation on the assessed premises. Proof of the execution of the warrant, diagram and assessment, etc., was not required, as no allegation of the complaint touching the existence and due execution of these papers was denied by the answer.

The objection to the assessment list that "there is no dollar mark to indicate that they were assessed," is not well taken. The dollar mark is placed before the amount in the footing of the several assessments of the different lots, and this is equally as significant and effectual an indication of what the figures in the different entries footed are intended to represent as though the dollar mark had been placed at the head of the column.

Although the rejected testimony tended to establish that the owners of a major part of the frontage of the lots, liable to be assessed for the improvement, had entered into a contract with the superintendent of streets to do the work at the rates proposed by Dougherty, to whom the same had been awarded, yet, as appears by the evidence, the property owners failed to enter upon the performance of the work under such contract within the ten days next succeeding publication of the award to Dougherty, as required by section 6 of the street law: Stats. 1862, p. 390. Upon this point the evidence is apparently somewhat conflicting, but it is of a character, in

our judgment, to fully justify the conclusion, to which the judge must have arrived therefrom, that the property owners, under their contract, did not commence the work within the time prescribed by law, and hence, the street superintendent was required to enter into the contract with Dougherty; and having, in the judgment of the court, properly entered into that contract with Dougherty, the offered evidence was very properly excluded, as incompetent to affect the rights of Dougherty, or his assigns, under his contract.

The other assignments of error by appellant do not appear to have any foundation upon which to rest.

Judgment and order affirmed.

We concur: Sanderson, J.; Sawyer, C. J.; Crockett, J.; Rhodes, J.

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PEOPLE, Respondent, v. JOHN MELVILLE, Appellant.

No. 1990; July 19, 1869.

**Juror.—To Sustain the Refusing of a Peremptory Challenge** on the ground that the juror had already been accepted by the challenging party, the statement in the bill of exceptions must show that this juror had been sworn before so challenged; the fact may not be left to be inferred.

APPEAL from County Court, Santa Cruz County.

Attorney General for respondent; DeWitt & Wilson for appellant.

RHODES, J.—It is conceded by the attorney general that, if the bill of exceptions shows that the defendant challenged the juror Silver, before he was sworn as a juror, then the court erred in refusing to allow the challenge. It is stated in the bill of exceptions that the defendant challenged peremptorily certain jurors "before said jurors were sworn. That defendant afterward interposed his peremptory challenge to J. C. Silver, one of the jurors summoned to complete said panel; to which challenge the district attorney objected

on the ground that the defendant has accepted said Silver as a juror in said cause."

It does not clearly appear from this statement that Silver had been sworn, and we would not be justified in inferring from the fact that the jurors before named were challenged before they were sworn that therefore Silver was challenged after he was sworn. The language of the bill of exceptions, including the ground of the district attorney's objection, shows that the juror had not been sworn. Had he been sworn, that would have been urged on the ground of objection to a peremptory challenge, and we think no one reading the bill of exceptions could come to the conclusion that the juror was sworn before the challenge was interposed.

Judgment reversed and cause remanded for a new trial.

We concur: Sanderson, J.; Sawyer, C. J.; Sprague, J.; Crockett, J.

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## J. B. CHAMON, Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Respondent.

No. 1907; August 16, 1869.

**Pleading.—An Answer That Makes Mere Negative Averments** instead of direct denials may sometimes be upheld, since the form of the denial is not material provided it traverses the allegation it was intended to meet.

**Riots or Mobs—Destruction of Property.—Where the Complaint in an Action** to recover for property destroyed by riots or mobs alleges a specific sum as the amount of the destruction and demands that sum accordingly, and the answer merely "avers that said plaintiff, by reason of that which is mentioned in said plaintiff's complaint, has not sustained or suffered any damages whatever to exceed the sum of ————," mentioning a sum less than that alleged in the complaint, the value of the property destroyed or the amount of the damages, so far as it exceeds the lesser sum, is put in issue.

**Riots or Mobs—Destruction of Property.—Where in an Action** to recover for property destroyed the defendant does not deny the fact of the destruction but only the amount it is assessed at in the complaint, an offer by the plaintiff at the trial to prove the amount of interest due on the amount so assessed is properly rejected.

**Mobs or Riots—Destruction of Property.**—The statute of 1868. providing compensation for the destruction of property by riots and mobs, merely gives a right of action against the municipality, without prescribing any rules by which the amount of damages is to be assessed. The common law must be looked to for the measure of damages.

APPEAL from Fourth Judicial District, San Francisco County.

G. W. Tyler & J. R. Jarboe for appellant; J. M. Nougues for respondent.

SANDERSON, J.—This action was brought under the statute of the 27th of March, 1868, providing for the compensation of persons whose property may be destroyed by riots and mobs: Stats. 1868, p. 418. The plaintiff laid his damages at twenty-five thousand dollars. The defendant answered as follows:

"And now comes the defendant and, for answer to plaintiff's complaint, says:

"That defendant is informed, and verily believes the same to be true, that said plaintiff has not, by reason of anything mentioned in said plaintiff's complaint, suffered or sustained damage in the amount of twenty-five thousand dollars, and said defendant therefore, upon such information and belief, denies the same.

"And defendant avers, upon such information and belief, that said plaintiff, by reason of that which is mentioned in said plaintiff's complaint, has not sustained or suffered any damage or damages whatsoever to exceed the sum of two thousand and five hundred dollars, which sum of two thousand and five hundred dollars, and none other, said defendant admits said plaintiff has sustained and suffered by reason of that which is mentioned in plaintiff's complaint, and hereby offers to pay the same."

The pleadings were not verified. At the trial, a jury having been selected and agreed upon, the plaintiff put a witness upon the stand, and asked him what would be the legal interest upon the sum of twenty-four thousand nine hundred and ninety-nine dollars from the date at which the plaintiff had sustained the damages in question, up to the time of the trial.

To this question the defendant objected, and the court sustained the objection.

The plaintiff then rested, and thereupon the defendant did likewise.

The plaintiff then asked the court to instruct the jury as follows:

"Under the pleadings in this cause the plaintiff is entitled to a judgment against the defendant for the sum of twenty-four thousand nine hundred and ninety-nine dollars damages, with interest thereon, from April 15, 1865, at seven per cent per annum, and you are hereby instructed to find a verdict in his favor for that amount."

The court refused to give the instruction.

The plaintiff next asked the court to instruct as follows: "Under the pleadings in this case, the plaintiff is entitled to a judgment against the defendant for the sum of twenty-four thousand nine hundred and ninety-nine dollars, and you are instructed to find a verdict in his favor for that amount."

The court refused the instruction, and, of its own motion, instructed as follows: "Under the pleadings in this cause, the plaintiff is entitled to a judgment for the sum of two thousand five hundred dollars, and you will therefore find a verdict in favor of plaintiff, and against the defendant, for that amount."

To these several rulings the plaintiff duly excepted, and of them all now predicates error.

Two questions are presented: 1st. Whether the answer puts the damages in issue, as to the excess, if any, over two thousand and five hundred dollars; and 2d. Whether legal interest upon the value of the property, from the date of its destruction to the date of the trial, can be included in the recovery of damages.

Neither the complaint nor the answer can be considered as models for imitation, and possibly the imperfections of the latter are due, in a great measure, to the imperfections of the former. Had the complaint been more formal and precise, it is probable that the answer would have been less open to criticism. There is no question, however, but that counsel for the defendant intended to admit that some property of the plaintiff, of the general character described in the complaint, had been destroyed by a mob, but to deny that it was worth

to exceed the sum of two thousand five hundred dollars, or that the plaintiff had sustained damages by reason of the wrongs and injuries complained of, to exceed that amount. Instead of denials he employed negative averments. In Hill v. Smith, 27 Cal. 476, we upheld an answer of that character, holding that the mere form of the denial was not material, provided it directly traversed the allegation which it was intended to meet. Instead of denying that the property alleged to have been destroyed was of the value of twenty-five thousand dollars, or any other sum greater than the sum of two thousand five hundred dollars, he denies that, by reason of the premises, the plaintiff has sustained damages in the sum of twenty-five thousand dollars, but avers that he has not sustained damages to exceed the sum of two thousand five hundred dollars. Do not both forms amount to the same thing? The latter, I think, under the rule in Hill v. Smith, puts in issue the value of the property, or the amount of the damages, so far as they are laid at more than two thousand five hundred dollars.

The statute under which this action was brought does not, as I consider, establish any rule of damages, and, if the contrary view was taken by the court below, as suggested by counsel, the court was, so far, in error. The statute merely gives a right of action against the city and county for the injury complained of, without prescribing any rules by which the amount of the damages are to be assessed. For the measure of damages we must, therefore, look to the common law. What the measure is, however, is not material to the present purpose. This case was, in effect, submitted to the jury upon the pleadings. The offer of the plaintiff to prove what the interest would have been upon twenty-four thousand nine hundred and ninety-nine dollars was properly rejected, for it assumed that that sum represented the value of the property, which was not the case; besides, the value being given, the interest was a mere matter of computation. Upon the pleadings, the plaintiff was entitled to the verdict which he obtained, and nothing more. Upon the pleadings, the question of interest did not, and could not, arise. Upon the pleadings, the plaintiff was required to go into evidence of value, or take the sum offered by the defendant. Had he

adopted the former mode, the point as to interest might have arisen.

Judgment affirmed.

RHODES, J.—The statute under which the plaintiff proceeds provides, in my opinion, for the recovery of damages for the destruction or injury of corporeal property only. The plaintiff, therefore, is not entitled to recover for the destruction of, or the injury to, the "goodwill" of the newspaper mentioned, even if it were possible for it to have been injured by a mob. The plaintiff alleges that the newspaper. the business and goodwill thereof, and the other personal property mentioned, is of the value of twenty-five thousand dollars; but there is no averment of the separate value of such other property, or of the goodwill of the newspaper. There is no denial, as I construe the answer, that all the property mentioned in that averment is of the value mentioned, and, therefore, the value stands admitted; but as there is no allegation of the value of the property, in respect to which a recovery might be had in this action, the answer will not be construed as admitting that such property was of any value. It was, therefore, incumbent upon the plaintiff to prove the value of that property, if its value was a material fact. If that fact was not material, then it was incumbent on the plaintiff to prove the damages, if he wished to recover more than the amount admitted by the defendant. For these reasons I concur in the judgment.

I concur: Sawyer, C. J.

We dissent: Sprague, J.; Crockett, J.

## A. MARTIN & CO., Appellant, v. A. LEVY et al., Respondents.

No. 1968; August 26, 1869.

**Appeal—Review of Findings of Fact.**—It is only when a strong case is presented that the appellate court is disposed to disturb the verdict of a jury or the findings of the court below on a question of fact.

**Fraudulent Sale—Attaching Creditors.**—In a Contest Between the seller of goods and attaching creditors of the buyer, if the proof is that the representations under which the goods were bought were grossly false and fraudulent and that the buyer had no intention ever to pay for them, the findings ought to favor the seller.

APPEAL from Ninth Judicial District, Shasta County.

J. Chadbourne for appellant; W. P. Daingerfield for respondents.

SANDERSON, J.—This is a contest between the vendors of goods and the attaching creditors of the vendees. The goods were sold to Levy & Bro. upon a credit, and subsequently attached by the creditors of the vendees as the goods of the latter. The plaintiffs reclaim the goods upon the general ground that no title passed by the sale on account of the fraud of the vendees. The case was tried by the court, and the findings were for the defendants. It comes here upon the sole question whether the findings are not against the weight of the evidence. As to the law of the case, there seems to be no controversy between counsel.

It is insisted, upon the part of the plaintiffs, that the court ought to have found that the vendees, at the time of their purchase, made false representations as to their property, business, credit and general ability to pay, by which the plaintiffs were deceived and misled, and, further, that they purchased the goods with intent not to pay for them.

It appears from the evidence that at, or about, the time the goods were sold, plaintiffs had from some cause, doubts of the solvency of Levy & Bro., and called upon them for information in respect to their business, their assets and their debts,

with the view of determining whether it would be judicious to make the sale. In response Levy & Bro. represented that for every dollar they owed they were able to pay two; that they had real estate in San Francisco, clear of encumbrance, of the value of ten thousand dollars; that they had between thirty thousand dollars, and forty thousand dollars, of capital in their business; and that they had a valuable mining interest in Shasta county, which yielded them an income of a thousand dollars per month. They spoke of their mining interest in such a manner as to leave the impression that it was, of itself, an "immense fortune." Upon these representations the plaintiffs sold their goods upon credit, and it is quite clear that if these representations were false, no title to the goods passed to Levy & Bro. by the sale: Bell v. Ellis, 33 Cal. 620.

The goods were sold on the 28th of March, 1867, and shipped to French Gulch in Shasta county, where Levy & Bro. were engaged in the mercantile business. Soon after their arrival, and before the cases containing the goods had been opened, Levy & Bro. failed. And soon thereafter all their property was attached for nearly fourteen thousand dollars. In May, 1867, all the property of Levy & Bro. in Shasta county liable to execution, which included many goods purchased about the time of the goods in question, was sold by the sheriff, and the amount realized thereby was between ten thousand dollars and eleven thousand dollars. The real estate in San Francisco, instead of being free of encumbrance, was mortgaged for nearly its full value. Their mining interests, instead of being an "immense fortune," were worth about eighteen hundred dollars, and the mine, which was represented as yielding an income of one thousand dollars per month, was sold soon after, to avoid assessments, for fifteen hundred dollars; and in addition to a large indebtedness, contracted in San Francisco, at the time these goods were bought, they were in debt to the amount of about seventeen thousand dollars.

So, instead of being able to pay two dollars for every one they owed, they owed more than they were able to pay. Instead of their real estate in San Francisco valued at ten thousand dollars being unencumbered, it was mortgaged for seven thousand six hundred dollars. Instead of having between thirty and forty thousand dollars of capital in their business,

they had not to exceed ten or eleven. Instead of an immense fortune in mines, they had about eighteen hundred dollars.

We are never disposed to disturb the verdict of a jury, or the findings of the court below upon a question of fact. Before we will set either aside, a strong case must be made against it. But, in view of the foregoing facts, we cannot escape the conclusion that the representations made by Levy & Bro. at the time they purchased these goods were false within the meaning of the law applicable to cases of this character.

Judgment and order reversed, and a new trial granted.

We concur: Sawyer, C. J.; Crockett, J.; Rhodes, J.

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ALLEN T. WILLSON, Appellant, v. POWELL McDONALD, Respondent.

No. 1760; August 26, 1869.

**Judgment—When Allowed on Pleadings.**—A motion by the plaintiff for judgment on the pleadings can be allowed only where the answer wholly fails to deny any material allegation of the complaint.

**Continuance.—The Granting of a Motion for a Continuance is very much within the discretion of the trial court.**

APPEAL from Third Judicial District, Alameda County.

A. T. Willson for appellant; W. W. Crane for respondent.

SANDERSON, J.—The court did not err in denying the motion of the plaintiff for judgment upon the pleadings. Such motions can be allowed only where the answer wholly fails to deny any material allegation of the complaint, and we are not prepared to hold that such is the case here.

Motions for continuances are very much in the discretion of the court below, and we are of the opinion that it was not abused in this instance. The other points are considered untenable.

Judgment and order affirmed.

We concur: Sawyer, C. J.; Rhodes, J.; Crockett, J.

I dissent: Sprague, J.

EDWARD McGARRY, Respondent, v. G. L. PROFFITT et al., Appellants.

No. 1889; August 27, 1869.

**Cotenancy in Personalty—Sale by Co-owner.**—One tenant in common of personal property has no authority to sell the interest of his co-owner.

APPEAL from Sixth Judicial District, Sacramento, California.

Coffroths, Spaulding & J. H. Budd, for appellants; T. C. Edwards and W. W. Pendergast, for respondent.

SAWYER, C. J.—Upon the facts alleged in the complaint and found by the court, Proffitt and Houston were not partners, but only tenants in common of the cattle in dispute, and as cotenant, Proffitt had no authority to sell Houston's interest in them. This is the principal question in the case. Without a particular discussion of the several minor questions raised, it is sufficient to say that we find nothing in this record to justify us in reversing the judgment.

Judgment and order affirmed.

We concur: Crockett, J.; Rhodes, J.; Sanderson, J.; Sprague, J.

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GEO. A. MACOMBER, Appellant, v. T. M. YANCY, Respondent.

No. 2029; October 5, 1869.

**Appeal—Order Denying New Trial.**—The supreme court will not interfere with a judgment and an order denying a motion for a new trial, when the sole ground is that the verdict was contrary to the evidence.

APPEAL from Fifth Judicial District, Tuolumne County.

C. Dorsey for appellant; Galvin & Rodgers for respondent.

SANDERSON, J.—The only point made in this case is that the verdict is contrary to the evidence. We cannot disturb the judgment upon that ground. Counsel for plaintiff has argued the case upon the theory, that the only question to be determined is whether there was an immediate and continued change of possession after the sale by F. S. Macomber to the plaintiff. But that is not the only question arising upon the evidence, and if we should consider that the weight of the testimony is in favor of that position, the sale may still have been a pretense and a sham to delay creditors, and there are circumstances which tend to show that such may have been the case.

Judgment and order affirmed.

We concur: Sawyer, C. J.; Crockett, J.; Rhodes, J.; Sprague, J.

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N. C. BRIGGS, Respondent, v. SOLOMON WANGENHEIM, Appellant.

No. 2038; October 14, 1869.

**Execution—Wrongful Sale—Remedies.—The Right of Action** of a person aggrieved by the sale of his goods in execution of a judgment against another is not against the attaching officer alone; he may sue the purchaser for conversion.

**Appeal—Rulings not Excepted to.**—On appeal the court cannot notice rulings of the court below to which no exceptions have been taken.

APPEAL from Sixteenth Judicial District, Alpine County.

N. C. Briggs in pro. per.; Goff & Griffith and Coffroth & Spaulding for appellant.

SAWYER, C. J.—This is an action to recover the value of a large quantity of lumber, alleged to have been unlawfully taken and converted by defendants.

The first point is, that the action is against the wrong parties. That it should have been brought against the constable,

who sold the goods, and not against the defendants, who purchased at the sale upon their judgment. There is nothing in this point. The testimony shows, and the court finds, that defendants took possession of and converted the lumber. It is a matter of no consequence that some other party took it first, or that they purchased from a party who had no authority to sell it. They converted the lumber which belonged to the plaintiff. Somebody else may, also, have been liable, but this does not relieve the defendants from their own liability.

The next point is that the court erred in sustaining the objections to all evidence offered to prove the sale of the property under the judgment and execution in the case of W. P. Allen v. A. S. Murphy. Counsel have not referred us to the folio where the exception to the ruling of the court complained of is to be found, and we have not been able to find that any exception was taken. We have often held that we cannot notice rulings to which no exception has been taken. If parties choose to submit to rulings without taking exceptions, they cannot afterward question them here.

The third and last point is, that the court erred in permitting plaintiff to prove a derivation of title through Wade. The same answer applies to this point as to the last.

The order denying a new trial is affirmed.

We concur: Crockett, J.; Rhodes, J.; Sprague, J.; Sanderson, J.

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P. H. BURNETT, Respondent, v. J. R. TOLLES, Appellant.

No. 2027; October 25, 1869.

**Pleading—Cross-complaint—Estoppel.—A Person Who Answers a Complaint,** in an action against him, and then files a cross-complaint, cannot, after a judgment has been given in both suits, raise the point that he should not have been made a party to the action in the first place.

**Appeal.—A Judgment That cannot Injure the Appellant in** any respect is not to be reviewed on appeal.

APPEAL from Sixth Judicial District, Sacramento County.

J. K. Alexander for respondent; P. Dunlap for appellant.

SAWYER, C. J.—This is an action to recover certain lots of land in the city of Sacramento. The defendant, Tolles, denied the general allegation of title in plaintiff, and, also, denied that he was in possession. He then, as a cross-complaint, and for the purpose of affirmative relief, affirmatively set up title in himself, alleging that he had by certain conveyances obtained all the title which the plaintiff ever had in the lands in question; that his codefendant, Scott, was wrongfully in possession, and wrongfully withheld possession from him, and prayed for a judgment for the possession, and as against plaintiff, a judgment upon his title enjoining plaintiff from setting up any title against him, and for general relief. The cause having been tried by the court, the issues were determined in favor of the plaintiff and a judgment for possession of the premises rendered against the defendants. It is now claimed that there is no evidence tending to show that defendant, Tolles, was in possession himself; that, as landlord, he is not a proper party, and not being personally in possession the judgment should have been in his favor. For the purposes of this decision, it may be assumed that this view is correct when the landlord only takes issue on the allegations of the complaint. But in this case, defendant, Tolles, was not content with taking issue on the allegations of the complaint. He filed a cross-complaint, setting up title in himself, and asked affirmative relief, both as against the plaintiff and the defendant. The plaintiff, by answer to the cross-complaint, took issue upon it, and the issues were necessarily determined against the defendant, Tolles, or the judgment appealed from could not have been rendered. A mere judgment dismissing the plaintiff's action as to Tolles would not have disposed of the case as to him in view of the issues made on his cross-complaint, and determined. The judgment in effect, as it now stands, determines the title to be in plaintiff, and awards him possession of the land. He is entitled to the possession, and also to a judgment determining the question of title, as between him and Tolles. He gets by his judgment no more than he would if the judgment in terms had adjudged the title to be in him, as to both defendants, and awarded a recovery of the possession as against Scott, the defendant in possession. If there is any error in the form of the judgment, it is purely technical, without changing in any respect the

practical effect of the judgment. The consequences are precisely the same as if it were technically in due form. There is no way in which the appellant can be injured. The plaintiff having succeeded on the issue of title is entitled to his costs. We have often said that we would not review a judgment for error that can in no respect injure the appellant. In this case the plaintiff has got no more relief that he is entitled to in some form.

The second point is, that respondent proved no title to the premises, for the reason that there was wanting a deed from John A. Sutter, Jr., to John A. Sutter in the chain of title introduced. After averring title generally, the plaintiff specially alleges a grant from the Mexican government to John A. Sutter; the confirmation of the grant by the government of the United States; a patent from the United States to Sutter, and that by regular mesne conveyances from Sutter the property had been conveyed to plaintiff. The complaint is verified, and there is no attempt to deny these allegations. These admitted allegations show a title in plaintiff. The answer evidently did not intend to question this title, but the real defense contemplated by the answer was, that Tolles had acquired his title, which had thus been vested in plaintiff. And from the evidence it is apparent that Tolles relied upon title acquired through a tax sale. It is, therefore, of no consequence in the condition of the pleadings, whether the link in question was in evidence or not; for the title stood admitted on the record unless Tolles had acquired plaintiff's title. Besides there is no specification of this ground in the statement on motion for new trial. There was no reason for putting that deed into the statement, and for aught we can know, it was introduced in evidence.

The third point, in view of the numerous decisions respecting titles acquired by parties in possession through tax sales, the evidence in this case is frivolous.

The fourth point is untenable for reasons similar to those given in discussing appellant's second point, and the same answer applies to most of the points first filed by appellant's counsel.

There is nothing in the other points.

Judgment and order denying a new trial affirmed.

We concur: Crockett, J.; Rhodes, J.; Sprague, J.; Sanderson, J.

ADAM HOLLOWAY, Appellant, v. EMILE GALLIAC, Respondent.

No. 1996; November 30, 1869.

**Landlord and Tenant—Estoppel to Deny Title.**—A lease given to a person in possession of land by a person out of possession, and accepted by the first person under threat of being ousted in case of his rejecting it, does not estop the lessee to deny the title of the lessor.

**Evidence.—A Plaintiff Claiming Title Through Commissioners,** acting for a town to which lands have been confirmed, cannot rest on an admission by the defendant at the trial that such lands had been so granted, if virtually there was an exception in the grant; but he must show that the exception did not affect the property he was given title to.

See Holloway v. Galliac, 47 Cal. 474, 49 Cal. 149.

APPEAL from Third Judicial District, Santa Clara County.

Bodley & Rankin for appellant; S. O. Houghton for respondent.

RHODES, J.—The defendant was in possession of the premises in controversy at the time when he leased the same from the plaintiff. The plaintiff showed the defendant his title papers, and told him that, if he did not take a lease from him (the plaintiff), he would bring suit against him, and put him out of possession. According to the rule laid down in Tewksbury v. Magraff, 33 Cal. 244, and Franklin v. Merida, 35 Cal. 558, 95 Am. Dec. 129, the defendant is not estopped from disputing the plaintiff's title. The plaintiff not having held the possession at the time when the lease was made, and the defendant not having acquired the possession by means of the lease, nor any right or interest whatsoever in the premises, from the plaintiff, unless the latter, in fact, then held title, he cannot allege that the lease has worked any detriment to him, or deprived him of any advantage he then might have enjoyed, in trying the title to the premises.

The plaintiff, therefore, not being entitled to the benefit of an estoppel arising from the lease, to show his right to the possession cannot recover except upon proof of title. The same burden of proof is upon him that there would have been had he sued the defendant without executing the lease. He claims title under a deed from the commissioners of the funded debt of San Jose. The only evidence in the case of title in the commissioners of the funded debt is the admission of the defendant, made at the trial, that the lot in controversy is within the limits of the land confirmed to the city of San Jose as the lands of the former Pueblo de San Jose, that the commissioners of the funded debt of said city "held the legal title to all the pueblo lands confirmed to said city, as the successors in interest of said pueblo, which had not before that time been granted or conveyed by the authorities of the former Pueblo de San Jose, or the city of San Jose."

The defendant presents the point that it was incumbent on the plaintiff to show that the premises had not been granted or conveyed by the pueblo, or the city, prior to the execution of the deed of the commissioners to the plaintiff's grantor, and that, as the plaintiff offered no proof upon this point, he failed to show title in himself. The point is, in our judgment, well taken. One authority only is cited by either party: that of Taylor v. Taylor, 3 A. K. Marsh. (Ky.) 19. The conveyance before the court, in that case, was of "the balance" of the tract of fourteen hundred acres; and the court held that it was necessary for the plaintiff to show what "the balance" was, and that it included the land in contest. No authority is cited in support of that decision, but, in our judgment, it is sustainable on principle: Mayor and Common Council of San Jose, Uridias, April Term, 1869. A party claiming title under a deed cannot show title to the premises in controversy by the mere production and proof of the deed. He must locate the lands conveyed—at least he must show that the description of the lands in the deed includes the lands in controversy. The deed may accurately and completely describe a tract of land, but it is impossible that it should identify it, and, therefore, extrinsic evidence must be introduced for that purpose. Such evidence is required in the simplest and plainest cases, in respect to matters of description of the property, such as a conveyance of a town

lot, which is described by its number on the town plat. It may not be necessary for the plaintiff, in the first instance, to prove the location of the lot described in the deed, for if he show that the defendant is in possession of a lot designated by the given number, and there is no evidence to show that there is another lot in the town having the same number, the identity of the numbers is sufficient evidence that the lot described in the deed is the lot in possession of the defendant. The same rule obtains in respect to proof of the identity of persons. When the party claiming under a deed is of the same name as the grantee of the deed, the identity of the names is evidence of the identity of the persons; but when the names are different, as happens in case of the marriage of a female grantee, the person claiming under the deed must show that he or she is the grantee mentioned in the deed.

"The same rule for the reception of evidence" (says Phillips) "applies to the thing described in a written instrument, no less than to the persons described. Extrinsic evidence is admissible for identifying the thing as well as the person intended by the maker of the instrument, that is, to enable the court to interpret his words, and to determine whether the description applies to the thing claimed. It is obvious that some kind of extrinsic evidence, even in the simplest case—except where the mere exposition of the instrument, taken by itself alone, is required of the court—is indispensably necessary, and, therefore, admissible": 2 Phil. Ev., C. H. & E. Notes, p. 718.

The admission of the defendant implies that portions of the general tract confirmed to the city had been granted or conveyed by the authorities of the pueblo, or of the city, before title vested in the commissioners of the funded debt; and, in order to show to what lands the title did vest in the commissioners, it was necessary for the plaintiff to show what lands had been previously granted or conveyed by the former authorities of the pueblo or the city—or, what would be sufficient for the purposes of the case, that the premises in controversy had not been previously conveyed by such authorities. Had the admission been that the title to the whole general tract passed to the commissioners, with the exception of designated parcels, or of the parcels conveyed to designated persons, it would not be questioned that the bur-

den of proof would have been on the plaintiff to show that the premises in dispute were without the exception. But the terms in which the exception is stated can make no difference in the application of the rule in question.

Judgment and order denying new trial affirmed.

We concur: Sanderson, J.; Crockett, J.; Sprague, J.

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## THOMAS B. VALENTINE, Respondent, v. CHARLES J. JANSEN, Appellant.

No. 1723; December 2, 1869.

**Boundary.—A One-time County Surveyor may be Called to Explain** in court a plat produced from the official records but made by him during his incumbency, and in explaining may use memoranda and field-notes found among his private papers from which he made the plat.

**Deed—Estoppel—Description of Land.—A Jury may be Charged** by the court that if they believe a grantee was aware of the contents of the deed on its being delivered, then his accepting and recording it is competent evidence tending to show what land he claimed as his; provided it is charged at the same time that such acceptance would not estop him to claim that the true description of the land is other than that given in the deed.

**Boundary.—The Verdict of a Jury on the Question of a Boundary,** when the deeds produced in evidence were conflicting in their descriptions, and the oral testimony bearing thereon also conflicting, is to be taken as final.

**Deed—Uncertainty in Description.—A Deed Offered in Evidence** is not to be rejected because of alleged uncertainty in describing the land granted, since it is for the jury to decide from this and all other evidence produced at the trial what the true description is.

**Ejectment—Former Adjudication.—In the Trial of a Suit of Ejectment** a judgment-roll, writ of possession and return showing that in a former suit between the plaintiff's grantor and another not the present defendant, involving the same land, such grantor was given the possession, may be put in evidence, but only to prove the existence of such a judgment as tending to show the plaintiff's color of right.

**Appeal.—In a Statement on Appeal It is not Sufficient to have Indicated** what "the evidence tended to show," but the court must have the evidence itself submitted for the exercise of its own opinion as to the tendency.

APPEAL from Fourth Judicial District, San Francisco County.

This was an action of ejectment. Foley settled upon the Foley tract in 1849 and in June, 1853, sold to Welch. Clyne had been a tenant of Foley's, both living on the premises, and after the sale remained as the tenant of Welch. Subsequently Clyne asserted ownership, wherefore proceedings were started to dispossess him. He died in the midst of these, so that renewed proceedings were had against his executors; judgment was recovered against these in 1863: See Brooks v. Crosby, 22 Cal. 42. According to the testimony in the present case, immediately after that decision was rendered, and before the sheriff had executed the writ of restitution, which was executed August 10, 1863, in the morning before daylight the defendant Jansen, an adjoining proprietor, entered upon a part of the premises involved in the controversy, removed the fence which, ever since 1850, had been the common boundary between this property and his, which was to the south. He put up another fence farther north than the one removed, on the line of Napa street. The strip between the lines respectively of the old and the new fence was the subject of the dispute succeeding. Jansen was dispossessed and brought forcible entry and detainer, in which he was unsuccessful: Janson v. Brooks, 29 Cal. 214. Jansen entered again, and, Brooks having meantime conveyed to Valentine, this suit was begun. At the trial one William P. Humphreys testified for the plaintiff that in 1853 he was county surveyor of San Francisco county; he identified his survey, brought out from among the official records of the surveyor's office, marked "1605; July 11, 1853, surveyed for Mr. Jansen as per diagram," which survey was referred to as fixing the boundary lines in the deed from one Thorne to Jansen, through which deed the defendant held his undisputed property. Subsequently the same witness produced from among old private papers of his the field-notes from which the official survey already in evidence had been made out. The admission of these field-notes in evidence was assigned as error. In the same connection the court instructed the jury that if they believed from the evidence that, when that deed was delivered to Jansen, the latter was aware of its

contents, then his accepting it and putting it upon record were competent evidence tending to show what land he claimed as his own, and that the land adjoining on the north was otherwise owned and occupied; the court charging also, at the defendant's request, that such acceptance did not work an estoppel to claim some other description to be the true one, if the fact so was. The other points in the case on which the decision turns are sufficiently made to appear by the decision itself.

B. S. Brooks for respondent; Wilson & Crittenden for appellant.

SAWYER, C. J.—This is an action to recover land, both parties relying on prior possession dating many years back. The questions are the usual issues of fact arising in such cases, relating to possession, abandonment, etc.

We think the survey, traced copy with corrections, and field-notes, in connection with the testimony of Mr. Humphreys, the surveyor, were properly admitted. We think, also, that there was no error in submitting the deed from Thorne to defendant, carefully guarded as it was by the charge of the court and the critical instructions given at the request of defendant's counsel. Thus guarded, we are of the opinion that the taking of the deed, with the description contained in it, is a circumstance which the jury were entitled to consider with the other evidence relating to the location of the respective claims. We cannot say that the deed from Foley and wife to Welch was void upon its face for uncertainty. There are several descriptions in it, which may, upon applying it to the land, for aught that appears upon the face of the deed, identify it perfectly. Whether it covers the land or not, as in most cases, must depend upon other evidence. It rarely happens, we apprehend, that it can be ascertained by the court, upon inspection of the deed, without other evidence, whether it embraces the land in question or not. Whether it embraced the land or not was a question for the jury upon all the testimony. There was no error in admitting the deed at the time it was offered in evidence.

We think the judgment-roll, writ of possession, and return showing Brooks was put in possession in the case of Brooks

v. Crosby, executor, etc., was relevant and admissible for the purpose for which it was introduced—that is to say, to prove the existence of such a judgment, and that Brooks was put in possession under it: Brooks v. Calderwood, 34 Cal. 566; Moon v. Rollins, October Term, 1868. Suppose no other title had been shown, it would then have appeared that Brooks, plaintiff's grantor, was put in possession under this judgment, that is to say, that he was in possession under color of right at least, and that Jansen afterward entered and ousted him. Without any other testimony, this would have made out a prima facie case and entitled plaintiff to recover. This would make it necessary for Jansen to show some superior title or possession, prior to any of the plaintiff. The fact that both parties actually endeavored to show a possession antedating the proceedings in that case cannot affect the question of relevancy. Both parties might have failed on this part of the case. But even if the matter was irrelevant to the issues, the use to which it could be put was so clearly limited, and the real questions on the other evidence as to prior possession was so carefully and distinctly put to the jury, and the jury so well guarded on this point in the general charge of the court, as well as the clear and carefully prepared instructions given at the request of counsel, that it is scarcely possible that the jury should have made any improper application of the testimony. We think there was no error in rejecting the deed from Shear to Center.

In Rice v. Cunningham, 29 Cal. 499, we said: "The bare circumstance that by the ruling of the court evidence was brought to the notice of the jury out of its regular order is no ground for a new trial." If it be conceded that the testimony of Murray about Kline's fence, on cross-examination, was out of time, it is clearly not a matter of sufficient moment to justify a reversal of the order denying a new trial on that ground.

In the charge of the court and the numerous and very elaborate and carefully prepared instructions covering almost every conceivable point that could arise in the case, given at the request of counsel, the case was fairly submitted to the jury, and in such a manner that it seems impossible for the jury to have misapprehended any point of law involved in

the case. We think there is nothing in the giving or refusal of instructions to justify a reversal of the judgment or order.

The defendant's proposed statement on motion for new trial, with a view to show the bearing of the several points which were intended to be made, stated: "The plaintiff, on his part, introduced evidence tending to prove, etc. . . . . , whilst the defendant produced, on his part, evidence tending to prove the earliest possession, etc." The plaintiff objected to this mode of statement, and insisted that the evidence itself, which tended to show the facts, should have been inserted in place of the statement, that evidence was offered tending to show, etc., and proposed amendments accordingly; but the court refused to allow the amendments, and plaintiff excepted and protested against the mode of statement adopted. The objection to the form of statement adopted was, that the evidence of the defendant, taken as true, did not tend to show the facts as stated. This being the claim of the plaintiff, we think he was entitled to have the testimony in the statement, so that this court could judge for itself whether it did or not. The materiality and bearing of the points made by the defendant might depend upon the question whether the testimony did, or did not, tend to establish the facts as stated, and the propriety of the rulings of the court below, upon the points made might turn upon this pivot. In a disputed case, we think the plaintiff is entitled to have his statement prepared in such a way that this court can determine for itself whether the evidence tends to show the facts as claimed, or not. This court might differ from the district court, and agree with plaintiff's counsel, on this point. When there is no dispute about the tendency of the evidence, and it is only necessary to see its tendency in order to appreciate the points to be made, this brief way of statement is proper, and ought to be adopted, instead of encumbering the record with the evidence, but when the tendency of the evidence is itself a matter of dispute, the party claiming it to be different from that assumed by the district court is entitled to have it in the record, for his case may turn on that point, and the district court has no more right to finally

adjudge that question than any other that arises in the course of the trial.

Judgment and order denying a new trial affirmed.

We concur: Sanderson, J.; Rhodes, J.

We dissent: Sprague, J.; Crockett, J.

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THOMAS B. VALENTINE, Respondent, v. CHARLES J. JANSEN, Appellant.

No. 1723; April 12, 1870.

CROCKETT, J.—The contest in this case is as to the prior possession of a parcel of land in San Francisco. The plaintiff deraigns his title through B. S. Brooks, and on the trial put in evidence, against the objection of the defendant, the judgment-roll in an action of ejectment, wherein said Brooks was plaintiff against Crosby, executor of Kline, defendant; and wherein Brooks recovered a judgment or restitution, for a larger tract, including the premises in controversy. He also put in evidence a writ of restitution, issued on the judgment, and the sheriff's return thereon, from which it appeared that in September, 1863, the sheriff executed the writ, by placing Brooks in possession of the entire tract, including the premises in controversy. The present defendant, Jansen, was not a party to that action; and there was no priority between him and the defendant therein. So far as appears, Jansen was altogether a stranger to that action. In connection with this proof, the plaintiff called as a witness the deputy sheriff who executed the writ, who testified that, in executing it, he took his directions from Brooks, the plaintiff in the action; and that when he went to execute it, he found Jansen in possession of the land in controversy; and that by the direction of Brooks, he put out Jansen, and placed Brooks in possession. The court admitted the judgment-roll in evidence for two purposes only, to wit: 1st To prove itself and sustain the writ of possession; 2d. With the writ,

to transfer that possession. This ruling is assigned as error. The plaintiff insists the evidence was admissible, for the reason that it was competent for the plaintiff to prove the possession in his grantor, Brooks, at any time before the commencement of the action; and that it was likewise competent for him to show, as a part of the res gestae, the means whereby he acquired the possession; that in order to show and qualify the character of the possession he acquired through the sheriff, it was necessary for him to produce the authority under which the sheriff acted; which authority consisted of the writ, supported by a proper judgment; that the fact to be established was the possession of Brooks in September, 1863, and that fact could only be legitimately established by showing: 1st. The authority of the sheriff to put him in possession; and 2d. That, in pursuance of the writ, he placed him in possession. On the other hand, the defendant claims that inasmuch as Jansen was neither a party or privy to the action, the judgment-roll, writ of restitution and sheriff's return were not competent evidence against him, for any purpose whatsoever.

That Jansen was in no respect bound by the judgment and proceedings in the case of Brooks v. Crosby is too plain to admit of debate. It was not claimed in the district court, nor is it in this court, that he was in any manner bound by those proceedings. But it was clearly competent for the plaintiff to show an actual possession in his grantor, Brooks, at any time before the commencement of the action; and I do not perceive how a possession, acquired through a writ of restitution, could, in any manner, be established so satisfactorily as by the production of the judgment and writ, and calling the officer to show that he executed the writ by placing the party in the actual possession. The judgment and writ are used only to prove the existence of such papers, and that they constituted the authority under which the sheriff, whether rightfully or wrongfully, did in fact place the party in possession. No reason is perceived why the admission of such testimony, for such a purpose, and properly guarded by the instructions of the court, should work a hardship upon a stranger to the proceeding. We think the judgment-roll and writ of restitution, with the sheriff's return, were competent, for the purposes for which they were admitted.

But as they were competent only for this purpose, it was incumbent on the court carefully to prevent the jury from being misled, in respect to the force and effect of this testimony. The court, doubtless, endeavored to perform faithfully its duty in this respect; and hence, of its own motion, it charged the jury that "the judgment in Brooks v. Crosby (embracing this land) did and does not affect the right of Jansen, and could not, nor does it bind him, as he was not a party to the suit, and had no opportunity to be heard in that suit by his witnesses and counsel." The same proposition was substantially repeated, in other instructions, given at the instance of the defendant, and if the court had stopped here, its action on this branch of the case would have been free from objection. But we are constrained to conclude that other portions of the charge were calculated to confuse and mislead the jury, in respect to the weight to be attached to the recovery in Brooks v. Crosby. For example, the jury is instructed that the effect of the recovery of the judgment "was to transfer to Brooks whatever possession or right of possession Crosby had at the commencement of that action." It is not very accurate to say that the effect of a judgment for the plaintiff in ejectment is to "transfer" to him whatever possession or right of possession the defendant had at the commencement of the action. It is rather an adjudication that at the time of the commencement of the action the defendant was not entitled to the possession, and that the plaintiff was entitled to it, as against the defendant. But inasmuch as it was in no respect material to Jansen what the effect of the recovery was, as between Brooks and Crosby, the statement to the jury of the legal effect of the recovery, as between the parties to that action, was irrelevant, and calculated only to confuse and mislead. It would have been sufficient to say to the jury, as was said by the court, that the judgment did not bind Jansen, and could, in no manner, affect his rights. In this connection the court also instructed the jury that "it is the duty of the sheriff, under a writ of possession, to remove all persons from the premises described in the writ, and to put the plaintiff in possession, unless otherwise directed by the court." If the abstract proposition thus broadly stated be conceded to be correct (on which point it is not necessary we should express an opinion), it was

wholly irrelevant to any issue in the cause. The court properly informed the jury that Jansen was not bound by the judgment and his rights were not affected by it. If so, how could it be material for the jury to know what was the duty of the sheriff in executing the writ? The sole purpose of this proof was to establish an actual possession in Brooks in September, 1863. The judgment-roll, writ of restitution and sheriff's return were competent for no other purpose whatsoever. When it was shown by the judgment, writ, sheriff's return and the testimony of the deputy sheriff, that Brooks was placed in the actual possession, under the authority of the judgment and writ, this proof had performed its only legitimate function; and whilst, in one breath, the court instructed the jury that Jansen was not bound by the judgment, and his rights were not affected by it, it informed them, in the next, that in executing the writ it was the duty of the sheriff to remove all persons from the premises, unless otherwise directed by the court. The effect of the two instructions, construed together, was, that though the rights of Jansen could in no manner be affected by the judgment, nevertheless, if the sheriff found him in the actual possession, when he went to execute the writ, it was his duty, without any inquiry as to Jansen's rights, and without reference to the time when, or the circumstances under which, his possession commenced, to turn him out, and place Brooks in the possession. Such a proceeding would appear to affect, very materially, the rights of Jansen, inasmuch as he was thereby deprived of the possession. It may be said, however, that he could have avoided this result by a timely application to the court to stay the execution of the writ, or to be restored to the possession, if wrongfully evicted. This being conceded, it, nevertheless, does not appear for what reason it became material to inform the jury that it was the duty of the sheriff to remove Jansen from the possession, unless otherwise directed by the court. The fact to be established was the possession of Brooks; and the question whether Jansen was rightfully or wrongfully removed by the sheriff, however it may be solved, neither proves or tends to prove that Brooks had or had not the actual possession in September, 1863. But the plaintiff claims that he had the right to show that the possession acquired by Brooks under the writ was not only

actual but lawful; and that it was therefore proper and material for the jury to be informed that, in executing the writ, the sheriff had authority to remove Jansen, unless he was otherwise directed by the court. If it be conceded that, in the absence of a direction from the court to the contrary, the sheriff had authority to remove Jansen, and was therefore not a trespasser, does it follow as a legal conclusion from these premises that the possession thus acquired by Brooks was a lawful possession, as against Jansen? If Jansen was in the possession before and at the time of the commencement of the action of Brooks v. Crosby and had ever since maintained a hostile possession, and was neither a party or privy to the action, and for that reason was in no respect bound by the judgment, would it not be a legal solecism to say that a possession acquired by Brooks under the judgment would be a lawful possession as against Jansen? The sheriff may not have been a trespasser in executing the writ; but it would be a non sequiter to hold that, for that reason, the possession which he delivered to Brooks was a lawful possession as against Jansen. On the contrary, it may have been flagrantly otherwise. It is conceded, on all sides, that a party wrongfully evicted by the sheriff may be restored to the possession, on motion to the court. The right to be restored implies, ex necessitate, that the possession acquired by the plaintiff under the writ was unlawful; and that, too, even though the sheriff may not have been a trespasser in executing the writ. For these reasons, it is evident the instruction we are considering was not only irrelevant, but was eminently calculated to mislead the jury, even if it be conceded to be correct, as an abstract proposition of law.

The twenty-sixth and twenty-seventh instructions given at the instance of the plaintiff were to the effect that the execution of the writ of possession by the sheriff placed Brooks in the possession of the property; and if Jansen re-entered, after being so dispossessed, Brooks or his grantee would be entitled to recover the possession, unless Jansen could show a right to the possession. This proposition assumes that even though Jansen was found in the possession and was removed by the sheriff, the effect of the execution of the writ was to create in Brooks a prima facie right to the possession, as against Jansen, which, of itself, entitled the plaintiff to re-

cover in this action, unless Jansen had overcome this prima facie case by showing a better right to the possession. The general rule is, that a person, other than the defendant, found in the possession when the sheriff goes to execute the writ, is presumed to have entered under the defendant, and is, prima facie, subject to the writ; and if he claims to be in possession under a hostile title, it is incumbent on him to show it affirmatively: Sampson v. Ohleyer, 22 Cal. 200; Leese v. Clark, 29 Cal. 664.

If the court had instructed the jury that Jansen, being found in possession by the sheriff, was prima facie subject to the writ, if nothing appeared to the contrary, the instruction would have been proper. But instead of this, the jury was instructed that if Jansen re-entered after being dispossessed, Brooks or his grantee would be entitled to recover, unless Jansen could show a right to the possession. This was calculated to mislead the jury, and to beget the impression that, to overcome the title of Brooks, it was incumbent on Jansen to show a better after-acquired title. The presumption is, the court did not intend to convey this impression; but in declaring to the jury the effect of the recovery in Brooks v. Crosby, and of the possession which Brooks acquired under it, the court should have been extremely careful to exclude from the minds of the jury the impression that Jansen was debarred thereby from showing his right to the possession, by a prior possession or otherwise. We think the twenty-seventh instruction given on the request of the plaintiff was not sufficiently guarded in this respect, and may have misled the jury, notwithstanding the law on that point was correctly stated in the twenty-fourth instruction given at the request of the defendant.

On the whole, we think the instructions tended to mislead the jury in respect to the effect of the recovery in Brooks v. Crosby, and that the ends of justice require the action should be retried.

Judgment reversed and new trial ordered.

We concur: Wallace, J.; Temple, J.; Sprague, J.

## J. A. MOULTRIE, Respondent, v. JOHN BROPHY, Appellant.

No. 1951; December 4, 1869.

**Appeal—Where There has Been a Substantial Conflict of Evidence,** a judgment is not to be disturbed on the ground that it was unsupported by the evidence.

**New Trial—Denial No Ground of Complaint.**—Where, on a motion by the defendant for a new trial, the court so modifies the judgment as to accomplish for the moving party virtually all that a new trial could bring him, he has no cause for complaint if the motion as made is denied.

**Costs—Filling Blank in Judgment.**—The court, by filling a blank left in a judgment for the insertion of costs only performs a duty which would have devolved upon the clerk if the court had not so acted.

APPEAL from Third Judicial District, Santa Clara County.

Action of ejectment.

Spenser & Moultrie for respondent; S. O. Houghton for appellant.

CROCKETT, J.—There was a substantial conflict in the evidence as to whether Brophy was in possession of the whole tract, at the time of the commencement of the action; and we cannot disturb the judgment on the ground that it is unsupported by the evidence. Nor did the court err in modifying the judgment to the prejudice of the defendants. They moved for a new trial on the ground that the judgment, as originally entered, was erroneous, because it was for the possession of the whole tract, instead of one undivided half thereof. On the trial of the motion, the court admitted the error, and with the consent of the plaintiff, modified the judgment accordingly. We do not see on what ground the defendants can complain of this, or why there should be the useless formality of a new trial, in order to arrive at the same result, which was accomplished by modifying the judgment.

In filling the blank left in the first judgment for costs, by inserting the proper amount in the modified judgment, the court only performed a duty which would otherwise have devolved on the clerk; and there is nothing in the record to show that the cost bill was not filed in proper time.

Judgment affirmed.

We concur: Sawyer, C. J.; Rhodes, J.; Sanderson, J.; Sprague, J.

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## CRYSANTO CASTRO, Respondent, v. JEFFERSON BAILEY, Appellant.

No. 2023; December 4, 1869.

**Waters—Right to Turn Overflow on Neighbor.**—One over whose lands water spreads during freshets has no right to construct barriers so that he relieves these lands but inflicts the overflow upon the lands of a neighbor.

APPEAL from Third Judicial District, Santa Clara County.

S. O. Houghton for respondent; Archer & Lowell for appellant.

SAWYER, C. J.—We think the judgment correct upon the findings and amended findings made by the court. The case appears to us to be much stronger than Ashley v. Walcott et al., 11 Cush. (Mass.) 192, and Luther v. Winnisimmet Co., 9 Cush. (Mass.) 171. The dam was clearly a nuisance.

Judgment affirmed.

We concur: Rhodes, J.; Sanderson, J.; Sprague, J.

CROCKETT, J.—The gravamen of this action is, that the defendants erected a dam, whereby the waters, which, during freshets, found their way into the bay, across the lands of the defendants, were diverted from their natural and accustomed course, and were thereby made to flow across and upon

the plaintiff's land, whereby his growing crops were injured and the land rendered partially or wholly unfit for cultivation. In the complaint the dam is alleged to have been erected across a "brook or stream" called or known by several different names; and the defendants claim that the proof shows there was no brook or stream at the particular spot where the dam was erected; and that the water, during freshets, spread out at that point and dispersed themselves over Bailey's land, greatly to his detriment, and that the dam was simply intended, and only had the effect, to concentrate the water into an old channel, so as to protect Bailey's land from overflow. But we apprehend the alleged variance between the complaint and the proofs, on this point, is immaterial and that the defendants were neither misled nor prejudiced by it. Nor is it material whether the effect of the dam was to divert a running stream from its natural channel, or only to collect into one body the waters which had been accustomed to disperse themselves over Bailey's land, in finding an outlet to the bay. In either event, the damage to the plaintiffs was the same. If the water, during freshets, naturally spread over Bailey's land, he had no right to relieve himself of this inconvenience, at the expense of the plaintiffs; and by erecting an artificial barrier, so to accumulate and divert the water, as to overflow the plaintiff's land, which would, otherwise, have been free from inundation, if the water had been left to find its accustomed outlet to the bay. On the whole I see no reason to disturb the judgment.

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PEOPLE, Respondent, v. DOE No. 9365 et al., Appellants.

No. 1856; December 4, 1869.

**Writ of Assistance—Presumption.**—A Judgment upon a Writ of Assistance awarding to the purchaser, at a sale for delinquent taxes, so much of the lot as the sheriff ought to have deeded when erroneously deeding the whole, will be, in the absence of specific findings, presumed to have been supported by necessary facts.

APPEAL from Sixth Judicial District, Sacramento County.

H. Starr for respondent; Cantwell & Dunlap for Brown.

CROCKETT, J.—It appears from the record that the taxes were delinquent on lot No. 4, in the block between I and J, Twelfth and Thirteenth streets in the city of Sacramento; that an action for the collection of the taxes was commenced in the name of the people, against the lot and the unknown owners thereof, who were sued by the fictitious names of John Doe and Richard Roe; that a copy of the summons was posted and a notice published by the district attorney of the pendency of the action; that a judgment was rendered against the lot for the taxes and costs; and under an order of sale issued on the judgment, the sheriff sold to one Elliott, not the whole lot, but the west sixty feet thereof, and issued to him a certificate of sale for the sixty feet; that the sheriff, however, in his return upon the order of sale, stated that he had sold the whole lot to Elliott; that there was no redemption, and in due time the sheriff made a deed to Elliott for the entire lot; and, having demanded the possession, which was refused by one Brown who claimed to be in possession, Elliott applied for a writ of assistance to put him in possession of the whole lot. The motion was contested by Brown; but the court granted it as to the sixty feet and refused it as to the remainder of the lot. From this order Brown prosecutes this appeal. On the trial of the motion, the evidence was conflicting as to the possession of Brown. He testified that about two years before the trial, he purchased the lot at a tax sale, and took the tax deed in the name of his wife; that the lot had formerly been inclosed; but the fence was broken down in many places, and after obtaining the tax deed, finding the lot vacant, he took possession of it, repaired the fences and has used it ever since as an inclosure for stock. On the other hand, Harvey, a witness for Elliott, testified that his brother in law had the Sutter title to the lot and left it in charge of the witness in 1861; that after the flood of 1862 the fence was all gone, and the witness then rented the lot to one Baker, who put a substantial fence around it and occupied it for several years, and that since Baker left, the witness has had the possession of it and occupied it; and that he never knew Brown to have possession of it or to have anything to do with it, and he knows that Brown never put up the fence around it, unless he did it in the night-time; that

the same fence is now around it that Baker put there in 1862, and the witness was always in possession by himself or tenant, from 1861 to the present time. There was no other evidence in respect to the possession. The court filed no separate findings of fact; but recites in the judgment that it finds Elliott to be the owner of the west sixty feet of the lot, by virtue of the sheriff's deed, and awards him a writ of assistance as to that portion. In the absence of any specific findings of fact, we must presume the court found the necessary facts to support the judgment. On the proofs, the court may well have found, and we must therefore presume, in support of the judgment, that it did find that Brown had not, at any time, either the possession of or title to any part of the lot; and therefore had no standing in court. He does not pretend to have had any other than a tax title, which was not produced, that the court might decide upon its validity; and the evidence as to his possession was so conflicting that the court may well have found against him on that point.

Judgment affirmed.

We concur: Rhodes, J.; Sawyer, C. J.; Sanderson, J.; Sprague, J.

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G. CHIARINI, Respondent, v. N. ROCHON, Appellant.

No. 2097; December 17, 1869.

**Sale—No Meeting of Minds as to the Goods to be Sold.**—Where, in a proposed sale of personalty, the seller thinks to transfer property of one description while the buyer thinks to receive property of another and a more valuable description, there is no meeting of minds and hence no sale results, even though the seller's agent ignorantly transfers the more valuable property and gives a bill of sale for it.

**Damages—Motion for New Trial Because Excessive.**—Where a defendant conceives damages to be excessive, he should, on motion for a new trial, have his statement specify in what respect the evidence was insufficient to support this portion of the finding, and wherein and for what reason the damages were excessive.

APPEAL from Sixth Judicial District, Sacramento County.

M. C. Teluim for respondent; Coffroth & Spaulding for appellant.

CROCKETT, J.—We cannot disturb the judgment in this case on the ground that the findings are unsupported by the evidence. The evidence was conflicting on some points; but, on the whole, we think the facts were correctly found by the court. From these facts it necessarily resulted as a conclusion of law that the minds of the contracting parties never met in respect to the subject matter of the contract. The plaintiff thought he was selling a pair of white mules which he owned, and the defendant thought he was purchasing a pair of brown mules, of much greater value. It was a case of mutual mistake in respect to the property which was the subject matter of the contract; and in such cases it is obvious the title does not pass. It is quite plain the plaintiff never sold or intended to sell the brown mules to the defendant, and he still retains the title to them; nor did his agent who executed the bill of sale have any authority to convey or deliver the possession of the brown mules. He simply misunderstood the contract, and acted under a mistake as to his authority.

If the damages were excessive, it was incumbent on the defendant, in his statement on motion for new trial, to specify in what respect the evidence was insufficient to support this portion of the finding, or wherein or for what reason the damages were excessive. If the matter had thus been brought to the attention of the court and counsel, it might then have been corrected, if erroneous; but it is too late to raise the point for the first time in this court.

Judgment affirmed.

We concur: Rhodes, J.; Sanderson, J.; Sawyer, C. J.

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## FREDERICK A. HIHN, Respondent, v. CHARLES PARKHURST, Appellant.

No. 1683; December 17, 1869.

**Partition—Costs—Lien on Shares.**—Section 308 of the Practice Act, providing that in partition suits the costs shall be paid by the respective parties proportionately and may be included and specified in the judgment, and proceeding then to provide for their becoming a lien on the shares in certain cases, contemplates that their so becom-

ing a lien depends upon how the owner of the share may elect, and the solution of the question depends upon whether they are included and specified in the judgment of partition.

**Costs—Collateral Attack on Judgment for.**—A judgment for costs, without regard to whether it is or is not regular, cannot be attacked in a collateral proceeding.

APPEAL from Third Judicial District, Santa Cruz County.

Suit for partition.

Peckham & Payne for respondent; S. O. Houghton for appellant.

RHODES, J.—When the final decree of partition was rendered in September, 1864, the question of costs was reserved until the next term of the court; and on the 8th of December, 1864, judgment was rendered in favor of the plaintiff in the partition—the plaintiff herein—against several persons for costs, and, among others, against Maria Luisa Juan for thirty-four dollars and fifty-six cents. It is provided by section 308 of the Practice Act that the costs of partition shall be paid by the parties respectively, in proportion to their respective interests in the land, "and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties." It is contemplated by the section that the costs may or may not become a lien upon the several shares of the parties, as the parties to whom they are due may elect, and the solution of the question as to whether they become a lien depends upon whether they are specified and included in the judgment of partition. The statute does not say that the costs shall, in all cases, become a lien, but that "in that case"—that is, when they are "included and specified in the judgment"—they become a lien. The lien here referred to is one that takes effect by relation, at the time of the filing of the notice of lis pendens, and without docketing the judgment; and the express provision that such lien may be acquired in a particular mode negatives the right to acquire it in another mode. The costs may be, and usually are, inserted in the judgment, and if they are not taxed at the

time the judgment is entered, they may be inserted in a blank left for that purpose, as in other cases (sec. 511); but, whether the judgment for costs was regular or not, it is not subject to be collaterally attacked in this action. Although this judgment grew out of the proceedings and judgment in the partition suit, it is clear that it is separate and distinct from, and forms no part of, the judgment of partition. From the time it was docketed it became a lien upon the real estate owned by Maria Luisa Juan; but as the interest claimed by the interveners, one fifty-fourth, had been conveyed to them long before the docket entry was made, it was not subject to the lien of the judgment.

Judgment reversed, and cause remanded for a new trial.

We concur: Crockett, J.; Sanderson, J.

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PEOPLE, Respondent, v. MOSES J. MELLON, Appellant.

No. 2077; December 17, 1869.

**Appeal—Failure to Follow Statute in Taking.**—An appeal presented on documents of an irregular sort not in accord with the statutory requirements for bringing cases up on appeal will not be considered.

APPEAL from County Court, Yuba County.

Attorney General for respondent; Whiteside & McQuaid and George Rowe for appellant.

SAWYER, C. J.—There are two separate and distinct documents filed in this case. One is certified by the clerk to be "a full, true and correct copy of the original record and notice of appeal in the aforesaid entitled cause, as the same now remains of record and on file in the office of the said court." This document seems to be mostly made up of a copy of the indictment, the minutes of the court, some affidavits, and a copy of the notice of appeal. None of the questions made by appellant's counsel are presented by this document or record.

The other document has no certificate at all of the clerk of the county court. It is wholly unauthenticated, and is such a document as anybody might make up and file in this court. In truth it has no business on the files of the court. We cannot notice it. Judgment affirmed.

We concur: Crockett, J.; Rhodes, J.; Sanderson, J.

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PEOPLE, Respondent, v. SAMUEL JONES, Appellant.

No. 2068; December 17, 1869.

**Juror.—An Opinion as to Guilt or Innocence, based on rumor or** purported facts in the case, not fixed and settled but which would require evidence to remove, does not subject a proposed juror to challenge for implied bias.

**Criminal Trial—Examination of Witnesses.—A Defendant may not Open His Own Case** by cross-examining witnesses for the prosecution because they happen to know facts pertinent to the defense; he must wait until the prosecution rests, and then call the witnesses as his own.

**Criminal Trial.—Requested Instructions, When in Effect** they have already been given with equal fullness and greater accuracy, are properly refused.

APPEAL from Eighth Judicial District, Humboldt County.

Attorney General for respondent; Cadwalader for appellant.

SANDERSON, J.—The answer of Ensign, that "he had formed an opinion as to the guilt or innocence of the accused, based upon rumor, or what purported to be the facts in the case, which opinion would require evidence to remove, but that it was not a fixed and settled opinion," differs in no essential particular from the answers given by Davis in King's Case, 27 Cal. 508; and, for the reasons there stated, the court below did not err in disallowing the challenge of the defendant upon the ground of implied bias.

It was not error not to allow the witness Goodman to testify upon cross-examination as to what took place between the defendant and the deceased at Tompkin's saloon a short time before the homicide was committed. Counsel did not propose to contradict anything the witness had said in relation to what transpired at Brook's saloon, where the homicide was committed, nor explain in any manner the acts or facts to which the witness had testified. His object was to prove threats made by the deceased at Tompkin's saloon, which were clearly a part of the defendant's case. The rules of law in relation to the introduction of evidence do not allow a defendant to open his own case by cross-examining the plaintiff's witnesses, because they happen to know facts which are pertinent to the defense. In such cases the defendant must wait until the plaintiff rests, and then call the witnesses as his own: 1 Greenleaf on Evidence, sec. 447. But, in addition to this, the case shows that Goodman was afterward called by the defendant and the same facts elicited which counsel sought to prove by him upon cross-examination.

The second and third instructions requested by the defendant, in relation to the law of self-defense were properly refused, upon the ground that that branch of the law had just been declared by the court with equal fullness and greater accuracy. The same is true of the fifth, in relation to manslaughter.

It is contended, however, that if the court refused these instructions upon the ground that equivalent instructions had already been given, it was error in the court not to so state to the jury, and, in support of this doctrine the cases of Hurley (8 Cal. 390), Ramirez (13 Cal. 172), and Williams (17 Cal. 142) are cited.

If the instruction has been read or discussed by counsel in the hearing of the jury, and only where such has been the case, it may be well enough, as suggested in those cases, for the court to inform the jury that it is refused, because its equivalent has already been given, or is about to be given; but there is an obvious absurdity in adopting such a course. It is the same as saying to the jury: "This instruction represents the law correctly, but I refuse to give it to you as law because I have already done so, or am about to do so,"

which is both giving and refusing. It would be more consistent with the dignity of the court and the solemnity of the occasion to give the instruction. But be that as it may, if such was the duty of the court, there is nothing in the record in this case which shows that its performance was neglected or omitted. Error cannot be presumed, but must be shown: People v. Chung Lit, 17 Cal. 322; People v. Garcia, 25 Cal. 531; People v. Shuler, 28 Cal. 496.

Conceding that this court has jurisdiction to review the testimony in a criminal case and determine whether it sustains the verdict, which is a mooted question (People v. Jones, 31 Cal. 565), we find nothing in the facts in this case which lead us to doubt the justness of the verdict.

Judgment affirmed.

We concur: Rhodes, J.; Crockett, J.; Sawyer, C. J.

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ANN CAMPBELL, Appellant, v. J. S. SHELDON et al., Respondents.

No. 1847; December 17, 1869.

**Trust—Creditors.—The Grantee of a Trustee Under a Valid Deed of Trust,** made with the consent of creditors, takes the granted premises relieved of the trust and is not accountable to such creditors afterward.

APPEAL from Seventh Judicial District, Solano County.

J. S. Sheldon was indebted to the plaintiff and others and, becoming embarrassed financially, executed a deed of trust to one G. W. Mowe for the benefit of his creditors. The pleadings in the case were very long, but, amongst other things, the plaintiff alleged in the complaint that on the 25th of October, 1860, the trustee as such sold a portion of the land, conveyed by the trust deed, to one J. H. Carroll, and that said Carroll took with full knowledge of the trust; also that thereafter Carroll sold about one hundred acres of this land to Martin, one of the defendants, for two thousand eight hun-

dred dollars; that Martin entered into the possession and received the rents and profits, and that on the 5th of December he was given a conveyance by Carroll and so took with full knowledge of the trust. The prayer was that all the defendants be made to account for all sums received by them from sales of the land by the trustee, that the sales be annulled, etc., and for the appointment of a receiver. The appeal was from a final judgment by the trial court rendered on the defendants' motion to dismiss, for that the complaint failed to state facts sufficient to constitute a cause of action.

W. S. Wells for appellant; Rayle, Swan & Hays for respondents.

CROCKETT, J.—It appears from the complaint that the trustee, Mowe, had authority to sell the trust property for the payment of the trust debts; and that in the due execution of the trust he sold the land specified in the complaint to the defendant Carroll. It is not alleged that the trustee exceeded his powers, or that the sale was for an inadequate price, or was in any respect unfair or fraudulent. The effect of the sale was to vest the title in Carroll, discharged of the trust. The sale from Carroll to Martin is not alleged to have been in any respect fraudulent; and as the title was fairly in Carroll discharged of the trust, it is not perceived what interest the plaintiff had in any disposition Carroll might see fit to make of it. If Martin purchased it, with the understanding that Sheldon or his wife might have the benefit of any advance there might be in the value of the property, the plaintiff was not thereby injured; because the land, by reason of the sale to Carroll, was exonerated from the trust; and the plaintiff had no longer any interest in it. If Martin had chosen to do so, no reason is perceived why he might not have given the land or its proceeds to Mrs. Sheldon, or sold and conveyed it to her. The plaintiff, in that event, could have asserted no interest in or lien upon the fund, by virtue of the trust deed; for the reason that the trustee had already exhausted his functions under the deed, and the title had passed to Carroll discharged from the trust. If the plaintiff claims that the land or its proceeds is subject to her debt, because, under the arrangement with Martin, Sheldon and his

wife are the beneficiaries of the fund, and that as a general creditor, without reference to the trust deed, the plaintiff has the right to have the property of the judgment debtors applied to the satisfaction of her judgment, no ground is stated in the complaint for equitable relief. If the judgment debtors had any property subject to the judgment, she had a sufficient remedy at law, either by a sale of the property under the execution, or by proceedings supplementary to execution. In any view we are able to take of the complaint, we think it exhibits no cause of action, and that the court properly entered a judgment for the defendants on the pleadings.

Judgment affirmed.

We concur: Rhodes, J.; Sanderson, J.; Sawyer, C. J.

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## ELOISA SEPULVEDA, Appellant, v. SALISBURY HALEY et al., Respondents.

No. 2166; March 14, 1870.

**Quieting Title—Possession of Plaintiff.**—In a suit under the statute to determine an adverse claim to real estate the plaintiff must show such a possession as would enable him to maintain the suit, which possession is an actual occupation by himself or tenant so far sufficient that without the aid of a deraignment of paper title he might by an action validly eject a mere intruder from the premises.

APPEAL from Seventeenth Judicial District, Los Angeles County.

Glassell, Chapman & Smith for appellant; Howard & Sepulveda and Kewen & Howard for respondents.

WALLACE, J.—This was an action brought by the appellant under the provisions of section 254 of the Practice Act, for the purpose of determining an adverse claim set up by the respondents to certain real estate alleged to be in the possession of the appellant and whereof she claimed to be seised in

fee. At the trial, upon motion of the respondents, a judgment of nonsuit was entered against her, and from that judgment she has taken this appeal.

The motion was based upon four several grounds. The first was, that it did not appear that the appellant had such a possession of the premises as would enable her to maintain the action. The others presented questions of the construction and effect of certain deeds of conveyance running to the appellant, and which she had read in evidence to establish her title to the land in controversy.

We think that the case must turn wholly upon the sufficiency of the first ground of nonsuit urged, because, if the fact of possession in the appellant was not proven, then the nonsuit was properly granted, even though it should appear that she had the title in fee and the right to immediate possession: Lyle v. Rollins, 25 Cal. 437. And, upon the other hand, if the requisite possession was shown in her, she should not have been nonsuited, even if she had not attempted a deraignment of title to herself, or, attempting it, had failed to establish it. For it is not pretended that the effect of the deeds read in evidence was to show any title in the respondents, and until their title was in some way made to appear, the appellant might rest safely upon the mere fact of her possession of the lands and the presumptions arising therefrom in her favor.

We proceed, therefore, to consider the character of possession established in the appellant by the proof. It appears that the premises in controversy are not inclosed nor cultivated. It is true that the sheep and horses of the appellant graze upon this land, not, however, under the control of herdsmen, but only roaming at large, together with the stock of other persons, over the whole of the Rancho San Vicente, of which the premises in controversy are a portion. We think that these facts do not show such a possession in the appellant as is required by the statute for the purpose of maintaining this action. That possession should be a pedis possessio, an actual occupation by herself or tenant—a subjection of the land to her will and control, to the exclusion of all other persons—such a possession as would enable her, without the aid of a deraignment of paper title, to maintain an action to eject a mere intruder thereon. We do not mean

to be understood as holding now that where a pedis possessio of a portion of an entire tract of land is established in a party, he might not in such an action as this resort to the title deeds for the purpose of extending that possession to the outer boundaries of the tract, as against the defendant, where no adverse possession in any part of the entire tract appeared.

If, however, such adverse possession to a part of the land should be shown in a third person, then the suit would be considered as brought to determine the adverse claim of the defendant only to the land remaining in possession of the plaintiff, as was held by this court in Curtis v. Sutter, 15 Cal. 264.

We think that the appellant did not have such a possession of the premises as, under the provisions of the statute and the construction it has uniformly received in this court, entitled her to maintain this action, and the judgment of the court below is, therefore, affirmed.

We concur: Rhodes, C. J.; Sprague, J.; Crockett, J.

TEMPLE, J.—I dissent, and intend on some future occasion to express my opinion more fully.

TEMPLE, J., Dissenting.—This action is brought under the two hundred and fifty-fourth section of the Practice Act to quiet the title of plaintiff to three tracts of land, each being part of the San Vicente Rancho in Los Angeles county.

The plaintiff proved title under the grant, and, as to possession, that one tract had been entirely inclosed by her grantor, and was so inclosed at the time it was conveyed to her, which was about eight months before the commencement of this action, since which time the fence had been removed by the plaintiff.

On the second tract was standing the old ranch house, at present apparently unoccupied. During the year before the suit was commenced, a portion of this tract was cultivated by the plaintiff.

The plaintiff had upon the rancho one hundred head of horses and a hundred head of sheep, which were allowed to run over the three tracts as well as the other portions of the

rancho. There was also other stock upon the rancho, belonging to various persons, which, in common with the plaintiff's stock, also ranged over the whole rancho. There was not, and never had been, any adverse possession of any portion of the land.

I cannot agree with the majority of the court that these acts do not constitute such a possession as will authorize the plaintiff to bring this suit. The plaintiff has the absolute control and dominion of the land. She has the actual use of it, and is probably enjoying it in the most advantageous and profitable manner. She is in the actual possession of its profits. She has the highest estate known to the law—the right coupled with the actual enjoyment of her estate. Nor do I see that her position as owner in possession is changed by the fact that she grazes her land in common with her neighbors, whose cattle, with hers, graze over the whole rancho. There are good reasons why a mere intruder should be held to show notorious acts of possession and exclusive occupancy when he relies upon such possession as evidence of title; but this is no reason why the rightful owner should be held to any particular manner of using his estate, and if he is actually using it in the manner best suited to his convenience and is in actual perception of the rents and profits, and, besides, has full dominion and control of it, I think he is the owner in possession in the sense of the statute. It is a great mistake, in my judgment, to require from the rightful owner the same acts which are necessary to constitute adverse possession by a wrongdoer. The courts are more frequently called upon to discuss the question as to what acts will constitute adverse possession or be evidence of title, but there is, nevertheless, a clear distinction between the acts necessary to constitute such a possession and the acts which show possession in the rightful owner.

In one case a possessio pedis, which is exclusive in its character (unless under color of title), evidenced by notorious acts, is required. But the owner, at common law, after a mere entry, was deemed in the actual possession until ousted by an actual adverse possession. And this rule is not merely technical, but is founded in good sense. If an owner has full dominion and control of his property, and may, without hindrance, use it for any purpose he pleases, as he can if not held ad-

versely, he may well be said to be in possession in every sense of the word. How has he any greater dominion or control of it by building a shanty upon one corner of it, as seems to be intimated in the leading opinion? See 4 Kent, c. 38; 1 Wash. on Real Prop., 34; 1 Greenl. Ev., secs. 41, 42.

The only cases relied upon in the majority opinion are the cases of Lyle v. Rollins, 25 Cal. 437, and Curtis v. Sutter, 15 Cal. 260.

The case of Lyle v. Rollins went off upon the ground that the defendant was in the actual adverse possession at the time the action was commenced.

The case of Curtis v. Sutter was brought to quiet title to a tract of land containing eight leagues, and the complaint showed that portions of the land were held adversely by certain squatters, who, it was feared, might fortify their possession by purchasing in the adverse claim which was sought to be removed. In rendering the opinion of the court, Judge Field says that the statutes enlarge the class of cases in which equitable relief could formerly be sought in quieting titles, and that to maintain a bill of this character, it was necessary that the plaintiff should be in possession; and the bill would not lie as to that portion of the ranch which was adversely held by settlers. The character of plaintiff's possession to the portions not adversely held did not appear, but the misfortune of this case as an authority for the conclusion of the majority is, that beyond all question the possession of plaintiff in the case at bar is sufficient to sustain a bill in equity to quiet her title. To maintain that action it was only necessary that the plaintiff should have such a possession as would sustain an ouster. The plaintiff may have been ousted from the premises and may have recovered them in an action at law, and had restitution of them more than once, and yet had no actual occupation of the premises, and, unquestionably, in equity could have sustained her bill to quiet her title; and although in this case I believe the plaintiff established an actual possession, I think the true rule under the statute is, that wherever the owner has a possession, whether actual or constructive, which may be intruded upon, he may bring this suit to determine an adverse claim, and thus prevent an intrusion under claim of title. Indeed, in many states it is now held that an action will lie in equity to remove a cloud from the title of the owner when-

ever he is not in a position to have the conflicting claim determined in an action at law: Alton Marine Fire Ins. Co. v. Buckmaster, 13 Ill. 205; Smith v. McConnell, 17 Ill. 135, 63 Am. Dec. 340; Niven v. Belknap, 2 Johns. (N. Y.) 573; Munroe v. Ward, 4 Allen (Mass.), 150; Harris v. Smith, 2 Dana (Ky.), 10; Moran v. Palmer, 13 Mich. 371.

The precise question under this statute has never been decided in this state, nor, so far as I can discover, in any state where a similar statute exists. In Pralus v. Jefferson G. & S. Mg. Co., 34 Cal. 558, the question was raised, but was not passed upon, for the court concluded that the plaintiff had neither actual nor constructive possession, though it is said by Mr. Justice Crockett, in stating the conclusion to which the court had arrived: "Our conclusions, therefore, are: First, that in order to maintain an action of this character in respect to a mining claim on the public domain, the plaintiff must establish at least a constructive possession," etc.

There is no reason that I can see why the benefits of this statute should not be extended to those in constructive, as well as those in actual, possession. The chief benefits of the statute are that an adverse claim can be tried, while the evidence is available, to show its invalidity and to remove a doubt from the title which lessens the value of the estate. These reasons apply with equal force to a party having constructive possession, and he is equally unable to bring his action at law to determine the conflicting claim, and is, perhaps, even more liable to have his land intruded upon by reason of it. It can work no injury to anyone that such claims should be tried; on the contrary, since land has become an article of commerce, it would be most beneficial to give courts jurisdiction of such cases. The statute does not require any particular kind of possession, and I know of no authority in this court to add qualifying terms, especially when, as I think in this case, it is an innovation upon the common law establishing a new rule as to what shall constitute possession, when coupled with title, and doing away with a principle which has been universally recognized wherever the common law of England has prevailed.

## KIMBALL v. SEMPLE.

No. 1558; March 14, 1870.

**Appeal.—When the Appellate Court is Equally Divided in Opinion** the judgment appealed from will be affirmed.

See Kimball v. Semple, 31 Cal. 658.

By the COURT.—Justice Temple having been of counsel in this cause, and therefore disqualified from participating in the decision, and the other judges being equally divided in opinion whether the order of the district court should be affirmed or reversed, it is therefore ordered, in accordance with the practice of the court in such cases, that the order of the district court be affirmed.

Crockett, J.
Wallace, J.
Rhodes, C. J.
Sprague, J.

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## JAMES F. HIBBERD et al., Respondents, v. JOHN SMITH et al., Appellants.

No. 2104; March 21, 1870.

**Judgment Lien—Omission of Christian Name in Docket.—The** sole purpose of the judgment docket is to furnish a record which may be conveniently referred to by persons interested in lands on which a lien may be thought to have attached, and the omission of a Christian name in naming there the judgment debtor is not such a departure from the statutory requirements in that connection as to vitiate the lien.

**Judicial Sale—Advertisement—Return.—The Title of a Purchaser** of real estate at a sheriff's sale does not depend on and is not affected by the advertisement or the return of the officer to the writ, but rather on the judgment, execution, sale and deed.

**Deed.—The Delivery of a Deed to a Stranger for the Use** of the grantee is a valid delivery, and takes effect from the time of the act

by relation, provided the deed is afterward accepted by the grantee and the grantor intended it to take effect as a conveyance.

**Deed.—A Title by Relation cannot Override an Intervening Conveyance** or encumbrance acquired in good faith.

**Limitation of Actions—Title Derived from Spanish Government.** The term "final confirmation by the government of the United States," as used in the proviso of the act of 1855 amending the statute of limitations, includes the issuance of the patent, and when title is derived from the Mexican or Spanish government, the statute, in actions for the recovery of real estate, does not begin to run until the patent issues.

**Foreclosure Sale—Lien for Deficiency.—The Docketing of a Judgment** of foreclosure does not create a lien for the deficiency on the property of the judgment debtor, but to establish such a lien the deficiency, when ascertained, must be docketed as a personal judgment. From the time of so docketing only does such lien commence.

**Ejectment—Restitution.—A Writ of Execution Issued on a Judgment** in ejectment for a restitution of the land and for rents and profits need not (the writ of restitution having been already executed) recite the judgment further than to identify it.

**Appeal.—Exceptions Taken on the Ground That the Findings are not Supported** by or are contrary to the evidence are not valid; if findings are open to such objection, the party should move for a new trial.

APPEAL from Fourth Judicial District, San Francisco County.

A. M. Crane & Hoge for respondents; Hittell, Reynolds & Cobb for appellants.

See Hibberd v. Smith, 39 Cal. 145; 50 Cal. 511.

CROCKETT, J.—If the facts are correctly found by the court, it is manifest the title of the demanded premises is in the plaintiffs. The title having been finally confirmed to Antonio Peralta, and the facts as found showing a regular deraignment by mesne conveyances from Peralta to the plaintiffs, they are clearly entitled to recover on these facts, unless the action is barred by the statute of limitations. But the defendants insist that some of the material facts found by the court are not justified by the evidence. The plaintiffs deraign their title through a judgment, execution sale and sheriff's deed in the case of Hibberd v. W. W. Chipman and Aughin-

baugh, and the defendants through a conveyance from said W. W. Chipman to Edward S. Chipman, alleged to have been made prior to the time when the lien of the judgment attached, if there ever was a lien, which is not admitted. The court finds that the judgment was duly rendered and was duly entered of record and duly docketed on the first day of March, 1855; that an execution in due form was issued on the judgment in proper time, which was levied on the land in contest; that the land was sold by the sheriff under the execution to Hibberd, and that no redemption having occurred, the sheriff conveyed the premises to Hibberd by a deed in due form of law on the seventh day of July, 1858. In respect to the deed from W. W. Chipman to Edward S. Chipman, the court finds that on the sixth day of January, 1855, W. W. Chipman signed and sealed a paper purporting to be a deed of grant, bargain and sale to Edward S. Chipman, which purported to convey the land in contest, and on the same day acknowledged the same in due form of law before a justice of the peace, and thereupon left the deed with the justice until it was afterward handed to Aughinbaugh; that the consideration mentioned in the deed is five thousand dollars and other valuable considerations, but in fact nothing whatever was paid as a consideration; but at the time of making the deed W. W. Chipman was indebted to Edward S. Chipman; that when the deed was deposited with the justice, Edward S. Chipman was a resident of the state of Ohio and had been such resident for six months previously; and had no knowledge of the making of the conveyance then nor afterward, until after the thirtieth day of June, 1855, nor was the deed delivered to him until after the last-named day, nor was it ever delivered before that time to any person authorized by him to receive it, nor did he ever before said time assent to said conveyance. As a conclusion of law, the court holds the deed to be void for want of a valid delivery, as against the title acquired by Hibberd at the execution sale. The findings in respect to the judgment, execution sale and sheriff's deed are assailed on several grounds. It is claimed, first, that the judgment was not duly docketed in accordance with the statute, so as to create a lien; second, that the sheriff's deed had the effect in law to convey only such title as W. W. Chipman had on the first day of March, 1856, which was long subsequent to the time when the deed from

W. W. Chipman to E. S. Chipman took effect, and that, therefore, the sheriff's deed conveyed no title. We shall discuss these points in the order in which they are stated.

Section 204 of the Practice Act provides that immediately after filing a judgment-roll the clerk shall make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it shall become a lien on all the real property of the judgment debtor in the county owned by him at the time, or which he may afterward acquire, until the lien expires.

Section 205 provides that the docket mentioned in section 204 shall be a book kept by the clerk in his office, with each page divided into eight columns and headed as follows:

"Judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment book; appeals when taken; judgment of appellate court; satisfaction of judgment, when entered. If the judgment be for the recovery of money or damages, the amount shall be stated under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in alphabetical order."

The judgment docket which was put in evidence was divided into appropriate headings as required by the statute, and under the heading of "judgment debtors" were only the words "Chipman & Aughinbaugh," omitting the Christian name of each. Under the heading of "judgment" was the following: "$8,600. Costs $536.35. Restitution of lands." Under the heading of "where entered in judgment book" were "A, pages 169, 170." It is objected that this docketing was fatally defective, because it omits the Christian names of the judgment debtors. We do not understand the proof as showing that the docket was not alphabetically arranged, or that the name of "Chipman" does not appear in its proper place in alphabetical order. The objection is that his Christian name is omitted. The sole purpose of the judgment docket is to furnish a record which may be conveniently referred to by those who are interested in lands on which a lien may be supposed to have attached. Purchasers, mortgagees or others about to acquire an interest in or a lien upon lands require to have some reliable record of judgment liens to which they may refer

for information; and in order to determine the priority of successive liens, it is necessary there should be a record of them from the date of which they shall take effect. The sole purpose of sections 204 and 205 was to provide this record; and it would be an over-rigid construction of the act to hold that every slight departure from the strict letter of the statute vitiated the lien. If there is a substantial compliance with the act, we think it is sufficient. The title of the plaintiffs under the judgment comes through Chipman and not through Aughinbaugh, and as the name of "Chipman" appears at its proper place in the docket under the heading of "judgment debtors," and as the docket refers to the proper judgment book and page in which the judgment was recorded, no one could well have been prejudiced or misled by the omission of the Christian name. We think the statute was substantially complied with, and that the docketing was sufficient to create a lien as against Chipman.

The execution under which the land was sold to Hibberd directs the sheriff, in default of personalty, to make the amount out of the real property of the defendants belonging to them on the day when the judgment was docketed (March 1, 1855), or at any time thereafter; and the sheriff's deed recites that he levied upon and sold to Hibberd all the right, title and interest which the judgment debtors had in and to the land in contest on the first day of March, 1855. The defendants put in evidence, against the plaintiffs' objection, the advertisement of the sale by the sheriff, the certificate of sale, and the return on the execution, in all of which there are recitals to the effect that the interest of the judgment debtors which was levied upon and sold was the interest which they held on the first day of March, 1856, or afterward.

On this showing they claim that the deed was operative in law to convey only the interest which Chipman had on the last-named day, and that his title having, in the meantime, passed under his deed to E. S. Chipman, the plaintiffs acquired nothing by the sheriff's deed.

The title of a purchaser of real estate at a sheriff's sale does not depend upon and is not affected by the advertisement or the return of the officer to the writ. The title rests upon the judgment, execution, sale, and deed, and is not impaired by any defect, omission or false recital in the return or by his

failure to make any return: Cloud v. El Dorado Co., 12 Cal. 128, 73 Am. Dec. 526; Clark v. Lockwood, 21 Cal. 220. And in Hihn v. Peck, 30 Cal. 280, we hold that the recitals in the deed are sufficient to prove the sale, even if the return to the execution does not recite a sale. In this case the judgment was docketed and became a lien on the 1st of March, 1855. The execution directed the sheriff to sell whatever interest the defendants in execution had on that day, and it was his duty to obey the mandate of the writ. He recites in his deed that he did obey it, by selling that interest, and the presumption is that by mistake the figures "1856" were inadvertently inserted in the advertisement, certificate and return, instead of "1855." The sale was made in October, 1856; and such clerical errors frequently occur from the force of habit, by inserting the date as of the current year which the party is accustomed to write instead of a prior year. The proof offered by the defendants was not sufficient to overcome the recitals in the deed under all the facts of the case; and we express no opinion on the point whether it was competent to impeach the deed by proof of that character.

The next point of the defendants is that the deed from W. W. Chipman to E. S. Chipman was a valid and operative conveyance, and took effect as such before the lien of the judgment in favor of Hibberd attached. The facts attending the execution and alleged delivery of this deed are found by the court, and we think correctly found, upon the evidence. Certainly there was evidence strongly tending to establish the facts as found, and if there was any discrepancy between the witnesses, it was for the court below to decide upon their credibility; and we see no reason to disturb the findings on this point.

But assuming the facts to be as found, do they establish a delivery of the deed prior to March 1, 1855, when the lien of the Hibberd judgment attached? The argument for the defendants is, that the grantor, W. W. Chipman, being indebted to his brother, E. S. Chipman, this indebtedness was a sufficient consideration to support the deed, and that its execution and delivery first to the justice and afterward by the latter to Aughinbaugh was a delivery to a stranger for the benefit of the grantee, who is presumed to assent to a conveyance for his benefit. That a delivery to a stranger for the use

of the grantee will, in some cases, be a valid delivery, and will take effect by relation from the time of such delivery when afterward accepted by the grantee, admits of no doubt. But in all such cases it must appear that the grantor intended it to take effect as a conveyance, and thereby to part with the title and vest it in the grantee. If a grantor executes and acknowledges a deed, and without any declaration of his purpose puts it in his desk and retains the possession of it, no one will pretend that it is operative as a conveyance without some further act of delivery. So, if he executes it and deposits it with a third person, to be held subject to his order, and he afterward demands and regains the possession of it, there was no delivery, because there was no intention to deliver it or to part with the title: Fitch v. Bunch, 30 Cal. 208. Delivery, as a question of fact, depends more upon the intention of the parties than upon the particular method of fulfilling the intention: Hastings v. Vaughn, 5 Cal. 315. Hence, we have held that if a recorded deed be produced from the custody of a stranger to the title, the fact of recording is not evidence of its delivery. But if produced by anyone claiming under the grantor, it is some evidence of that fact: Barr v. Schroeder, 32 Cal. 610. In that event the recording tends to prove that the grantor intended it to take effect as a conveyance, and therefore tends to prove a delivery.

In this case all that appears from the findings is that W. W. Chipman was indebted to E. S. Chipman, who was in the state of Ohio; that he signed and sealed the deed, and left it with the justice before whom it was acknowledged; that afterward it was handed by the justice to Aughinbaugh; that no consideration was paid for the deed; that the grantee had no knowledge of it prior to June 30, 1855, and had authorized no one to receive it. Do these facts establish that when W. W. Chipman acknowledged the deed and left it with the justice he intended it thenceforth to be operative as a conveyance and translative of title as between himself and the grantee? On the other hand, was it not rather the ordinary case of the acknowledgment of a deed, and having it duly certified, so as to have it ready for use on a future emergency or on the happening of a contingency, the instrument in the meantime remaining under the control of the grantor? We attach no importance whatever to the delivery of the deed by the justice to Aughinbaugh.

The former had no authority to deliver it or the latter to receive it, and the validity of the delivery must rest wholly on what was done by W. W. Chipman at the time the deed was acknowledged. We agree with the district court that the facts do not show a valid delivery until after the lien of the Hibberd judgment had attached. Besides, it is well settled that a title by relation cannot override an intervening conveyance or encumbrance acquired in good faith; and even if the delivery to Aughinbaugh for E. S. Chipman was a sufficient delivery, so far as the grantor was concerned, the grantee must accept the deed before it becomes definitely operative as a deed, and such acceptance would not take priority over an intervening conveyance or encumbrance acquired in good faith.

The next points of the defendants are, first, that the grant to Peralta was a complete grant in fee, which did not require confirmation by the United States authorities; or, second, if it did require a confirmation, that it was finally confirmed more than five years before the commencement of the action; and third, that by a written stipulation in the cause, it was admitted that in 1851 Peralta was the owner seised in fee simple and in possession of the land in contest, and that because of these facts the statute of limitations is a bar to the action. We shall consider these points together.

The action was commenced in June, 1861, and is governed by the statute of limitations as amended in 1855. In Richardson v. Williamson, 24 Cal. 289, we held that the sixth section of the act was the only one applicable to actions for the recovery of land, and embraces every case for the recovery of the possession. We also held that the proviso to this section covers every case of title derived from the Spanish or Mexican governments. This proviso is in the following words: "Provided however that an action may be maintained by a party, claiming such real estate or the possession thereof, under title derived from the Spanish or Mexican governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title, by the government of the United States or its legally constituted authorities."

In construing this proviso this court has repeatedly decided that the term, "final confirmation by the government of the United States," as used in the act, includes the issuance of the

patent, and that when the title is derived from the Mexican or Spanish government, the statute does not begin to run until the patent issues: Johnson v. Van Dyke, 20 Cal. 225; Reed v. Spicen, 27 Cal. 57; Downer v. Smith, 24 Cal. 114; Fremont v. Seals, 18 Cal. 433; Vassault v. Seitz, 31 Cal. 225. But subsequently, by an act of Congress, it was provided that a final approved survey should have the same force and effect as a patent; and thereupon we have held that the statute commences to run from the time of the final approval of the survey: Mahoney v. Van Winkle, 33 Cal. 448. But to bring the case within the proviso, it is only necessary that the title of the plaintiff shall have been derived from a grant from the Mexican or Spanish government. Whether the grant convey a complete and perfect or only an inchoate title, the statute did not commence to run against it until it was finally confirmed. We could not hold otherwise without disregarding the express letter of the statute. There may be very substantial reasons why a perfect title derived from Spain or Mexico, and which needed no confirmation to establish it, should have been omitted from the proviso; but the legislature has deemed it proper to place all titles derived from those governments, whether perfect or imperfect, on the same footing in respect to the statute of limitations, and we have no power to exempt from its operation a class of title which the legislature has seen fit to include. It appears in this case that the action was commenced within less than four years from the time when the decree of confirmation became final by an abandonment of its appeal by the government of the United States, and there had been no final approved survey under the decree when the action was tried. Nor does the stipulation in the cause to the effect that in October, 1851, Peralta was "the owner seised in fee simple and in possession" of the demanded premises help the defendants. Though he may have been such owner in fee and in possession under a perfect title, it is not denied that his title was derived from Spain or Mexico; and, as we have seen, this fact brings the case fully within the proviso we have quoted. We think the court properly held that the action is not barred by the statute. Nor did the proceedings in the case of Hepburn v. Chipman, put in evidence or offered by the defendants, exhibit any defense to the action. It was an action to foreclose a mortgage on other property than that in

contest here, and there was a judgment of foreclosure with a personal judgment for any deficiency there might be, which judgment of foreclosure was duly docketed in 1854, and an order of sale was issued thereon, which was duly executed, leaving a large deficiency which was reported by the sheriff. But the deficiency was not docketed as a personal judgment against Chipman, or if docketed, not until long after the lien of the Hibberd judgment had attached. It is well settled in this court that the docketing of a judgment of foreclosure does not create a lien for the deficiency on the property of the judgment debtor, and that to establish such a lien, the deficiency, when ascertained, must be docketed as a personal judgment; and the lien does not commence except from the time the deficiency is so docketed: Chapin v. Broder, 16 Cal. 403; Culver v. Rogers, 28 Cal. 520. Under these facts, the title acquired under the Hibberd judgment was the better title.

In the course of the trial the defendants offered to prove by the witness Aughinbaugh what W. W. Chipman had said to him in relation to the deed of E. S. Chipman, and what he had directed him to do in relation to it just before Aughinbaugh obtained the deed from the justice, to wit, "to get the deed for Edward S. Chipman from the said Justice Hamilton, and hold it for said E. S. Chipman," but the court excluded the testimony on the ground that it was hearsay, immaterial and irrelevant; and this ruling is assigned as error. At the time when this testimony was offered and excluded, the witness had not stated, nor had it otherwise appeared, at what time he obtained the deed from the justice, nor whether it was before or after the 1st of March, 1855, when the lien of the Hibberd judgment attached; nor did the defendants in making the offer also offer to show that the conversation occurred or that the deed was obtained by Aughinbaugh prior to March 1, 1855. As the case then stood, the testimony was clearly incompetent, unless it was accompanied by an offer to show that the conversation occurred prior to March 1, 1855. If it occurred after that time, and if it be conceded to be competent evidence tending to prove a delivery (on which point we express no opinion), it is plain the lien of the judgment could not be impaired by a delivery of the deed after the lien attached. The witness, it is true, at a subsequent stage of his examination, testified, in a somewhat equivocal manner, that he received the deed from

the justice, prior to the 22d of February, 1855, but after this testimony the defendants did not renew their offer to prove the conversation with Chipman; and the ruling of the court was clearly correct at the time and under the circumstances under which it was made. If the defendants desired to have a ruling of the court as to the competency of the evidence to prove a delivery, they should either have accompanied the offer with an offer to show that the conversation occurred prior to March 1, 1855, or they should have renewed the offer after the witness had stated that he received the deed prior to March 1st.

When the execution and sheriff's deed under the Hibberd judgment were offered in evidence by the plaintiffs, the defendants objected, on the ground that the execution fatally misdescribes the judgment or rather that it recites a different judgment from the one put in evidence. The judgment was for the restitution of lands, and for rents and profits and the costs of the action. The writ of restitution having been executed, the execution in question was issued for the rents, profits and costs, and the costs of an appeal to the supreme court. It was wholly useless to recite in the execution the judgment for restitution; and it recites enough of the judgment to identify it, which is all that is necessary to uphold an execution sale. In Hunt v. Loucks [38 Cal. 372, 99 Am. Dec. 404], decided at the October term, 1869, we had occasion to discuss fully the subject of variance between the judgment and execution, and that case is decisive of this point.

The only question which remains to be considered relates to the defendants' exceptions to the findings. Several of the exceptions are on the alleged ground that the findings are not supported by or are contrary to the evidence. We have so often decided that this is no ground of exception to findings, and is to be corrected only on a motion for new trial, that we can but express our surprise that counsel continue to bring the question before us.

In respect to the omission or refusal of the court to find certain facts claimed to be material by the defendants, it is sufficient to say that the conclusions already announced in this opinion establish that if the omitted facts had been found in

their favor, and as they claim they ought to have been, it would not have benefited them. Judgment affirmed.

We concur: Sprague, J.; Temple, J.

Wallace, J., having been of counsel, did not participate in the decision of this case.

RHODES, C. J.—I concur in the judgment, and also in the opinion of Mr. Justice Crockett, except on the point in respect to the admissibility of the testimony of Aughinbaugh to show what was said to him by W. W. Chipman in relation to his deed to E. S. Chipman. It will be admitted by everyone that the delivery of a deed may be verbal, and that it may be made to a stranger for the grantee. In order to give effect to the deed, the better opinion is that it is necessary to show its acceptance by the grantee: 2 Wash. on Real Prop. 580. The defendants were, in my opinion, entitled to prove what the grantor said, in order to show a verbal delivery of the deed to Aughinbaugh for the grantee, without first proving the fact or time of its acceptance by the latter. Where an ultimate fact is to be established by proof of a series of probative facts, there is no rule of which I am aware requiring proof of the last fact in the series before adducing evidence of the first. The defendants, notwithstanding the exclusion of the evidence of the delivery of the deed, proved that the deed was accepted by the grantee, but after the lien of the Hibberd judgment had attached to the premises in controversy. The error of the court, therefore, in excluding the evidence was not productive of any injury to the defendants.

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JACKSON R. MYERS, Appellant, v. MAYOR and COMMON COUNCIL OF CITY OF PLACERVILLE, Respondents.

No. 2004; April 7, 1870.

**Mandamus—Title and Designation of Parties.**—Neither under the Practice Act nor by any rule or usage of the profession need a mandamus proceeding be given a title or the parties be particularly designated.

**Municipality—Subscription to Railroad Stock.**—In the Act Authorizing the city of Placerville to subscribe for the capital stock

of the Placerville and Sacramento Valley Railroad Company, the condition limiting the city's liability for the company's debts to the amount of the subscription so authorized did not contemplate its being itself annexed to the subscription on the company's books, but that the limitation was to attach ipso facto by the act of subscribing.

**Municipality—Subscription to Railroad Stock—Estoppel.**—After subscribing to stock of a railroad company, under a law regulating the preliminaries while conferring the power, a city is estopped to evade responsibility for its act by asserting that a step in such preliminaries by it was taken invalidly.

**Pleading.—Averments of Matters of Law in a Complaint Call** for no denial, and if denied present no issue.

**Municipality—Estoppel to Deny Bonds.**—After issuing bonds before satisfying conditions made precedent, under the law conferring the power to issue them, a municipality is estopped to say that it issued the bonds in violation of law.

**Municipality—Nonpayment of Bonds.—A Denial That a Municipality** failed or refused to pay interest on its bonds, coupled with an averment that there was no means for payment in the treasury, is an admission of nonpayment.

**Tax.—In a Mandamus Proceeding to Compel a Municipality to Levy** a tax to pay interest on bonds previously issued by it, a denial in the answer that any demand in the premises was ever made upon the municipality presents a material issue.

**Tax—Maximum Rate.—A Provision, in an Act to Reincorporate a Municipality,** making two per cent the maximum tax rate unless otherwise determined by a vote of the people or by special act of legislature, has reference to taxes to be levied for defraying usual municipal expenses, and not to such as may be necessary to pay obligations already incurred by the municipality.

**Municipality.—After Subscribing to Capital Stock of a Railroad Company** under a special act empowering it to do so, a municipality stands in the same relation to the company as any other stockholder except as expressly provided in the act.

**Municipality—Contract Void on Contingency.**—In an act empowering a municipality to make a particular contract, a provision allowing its common council an option to declare the contract void on a certain contingency does not make the happening of the contingency ipso facto a nullification of the contract.

**Tax.—A Valid Demand upon a Municipality for the Levying of a Tax** to pay interest on bonds, payable under a special act, must be made upon the mayor and common council as a body assembled; a demand each at his separate place of private business will not suffice.

Mandamus from Eleventh Judicial District, El Dorado County.

Latimer & McCullough for appellant; McCallum for respondents.

RHODES, C. J.—The objections to the petition for a mandamus—that it does not state the title of the action, nor describe the parties as plaintiffs or defendants, and that it does not state facts sufficient to constitute a cause of action—are not well taken. The Practice Act does not prescribe that a title shall be given to the proceeding, nor that the respective parties shall be designated by particular names, nor has any particular rule in those respects become established by the usage of the profession. The petition states sufficient facts to entitle the petitioner to the benefit of the writ.

The answer of the respondents takes issue upon many of the averments of the petition, which we regard as immaterial. It is alleged in the petition that the subscription to the capital stock of the Placerville and Sacramento Valley Railroad Company was made by the common council of the city of Placerville upon the books of the company upon the express condition that the city should not be liable for any of the debts or liabilities of the company beyond the amount of the stock so subscribed. This allegation is denied in the answer. The sixteenth section of the act to authorize the city of Placerville to subscribe to the capital stock of said company (Stats. 1863, p. 90) provides that such subscription shall be made upon the express condition named, but it was not thereby intended that such condition should be annexed in writing to the subscription upon the books of the corporation; but, rather, that such condition should, as matter of law, attach to the subscription when made. The averment of matter of law requires no denial, and, if denied, presents no issue.

They further deny that the notice required by law of the submission to the qualified electors of said city of the proposition to make such subscription to the capital stock of said company was given. This is not a matter entering into the contract between the city and the railroad company, but is addressed to the common council of the city. An election is required to be held under their direction, and they are to declare its result, and their conclusion is final, unless their proceedings are reviewed, and their decision reversed by competent authority; and after the result has been declared, and

they have proceeded to act thereon, the election cannot be collaterally contested by them. They are thereafter estopped to deny that the election was legally held, or that the result was in favor of the proposition voted upon.

By the seventeenth section of the act, the bonds of the city are forbidden to be issued until all that portion of the railroad lying in Sacramento county has been graded and put in a condition to receive the ties and iron, and it is the duty of the proper authorities of the city to see that the road has been so graded before issuing the bonds; but after the bonds are issued, they are estopped to say that, in violation of law, they issued the bonds before the requisite work was performed.

The denials that, by reason of the issuing and delivery of the bonds, the city undertook, or became liable, to pay the principal or interest of the bonds, or that it was the duty of the common council to levy a tax for the payment of the interest, or that it was their duty to pay the interest, or that it was their duty to order the treasurer to transfer from the general fund to the interest fund money to pay such interest, are severally denials of conclusions of law, and do not raise issues of fact.

The denial that the mayor and common council failed or refused to pay the interest, coupled with the averment that there was no money in the treasury with which to pay the same, is an admission that the interest was not paid by the city.

The denial that there is any money in the treasury belonging to the general fund is a denial of a material fact, for, if there is no money in that fund, a mandamus will not issue to compel a transfer of money from that fund to the interest fund.

The denial of any demand upon the common council to levy the tax presents a material issue, as was recently held in Oroville & V. C. R. R. Co. v. Plumas Co. [37 Cal. 354], (April Term, 1869): See, also, Tapp on Mand. 282.

The answer contains allegations which were made for the purpose, presenting the question whether the act to reincorporate the city of Placerville (Stats. 1863, p. 211), which was passed soon after the passage of the act to authorize the city to subscribe to the capital stock of the railroad com-

pany, and issue its bonds, and which limited the rate of taxation to two per cent upon the assessed value of the property, "unless an increased tax shall be authorized by a vote of the people, as hereinafter provided, or by a special act of the legislature of the state," operated upon the act last mentioned, so as to limit the rate of taxation to two per cent for all purposes, unless the additional rate should be authorized in the mode indicated in the act to reincorporate the city. We are of the opinion that the rate of two per cent was intended as the rate of the tax to be raised to defray the usual municipal expenses; that it was not intended thereby to limit the power of the common council in carrying into effect the provisions of the Railroad Act; and that the authority to levy the necessary tax to satisfy the principal and interest of the bonds, conferred by that act, is saved by the provision above cited.

The Railroad Act does not warrant the allegation of the answer that it is therein provided, as a condition to the validity of the bonds, that the railroad company should form a railroad communication between the city of Placerville and the town of Folsom. The city stood in the same relation to the railroad company as any other subscriber to the capital stock, except that the liability of the city for the debts of the company was more limited than that of ordinary stockholders, and that the city was permitted to pay its subscription in bonds, instead of money. For the construction of the railroad, the city, like any other stockholder, had to rely upon the ability and good faith of the company.

It is further averred that the railroad company entered into contracts for the construction and equipment of the railroad with several persons, and that the condition that the city should not be liable for any of the debts and liabilities of said railroad company beyond the amount subscribed by the city to the capital stock of the company, was not inserted in those contracts, and it is alleged that thereby both the subscription and the bonds became void. It is provided by section 16 of the Railroad Act that "this provision as to the liability of said city, shall be a part of, and expressly stipulated in all contracts by said company for the construction and equipment of said road." The section itself dictates the consequences attaching to a failure or refusal on the part

of the company to observe this provision—which are, that the common council "shall have power to declare said subscription void and of no effect," and may recover from the company the payments that have been made on the subscription. The bonds are not made void (nor, indeed, is the subscription) by a failure, on the part of the company, to comply with that provision, but the common council have power to declare—that is, they may at their election declare—the subscription void, and may thereafter recover back the amount paid on the subscription. The common council must initiate the proceedings by declaring the subscription void. But it is evident that it is not the intention of the act to give the city the power, not only to recover from the company the amount paid on the subscription, in bonds, but to render the bonds, also, void. That construction would produce a double satisfaction of the demand of the city, and would visit on the innocent holder of the bonds a penalty for a fault on the part of the company which he could neither prevent nor remedy. The averment, therefore, that the condition mentioned was not expressed in the contracts made by the company, for the construction and equipment of the road, is immaterial in this proceeding.

The pleadings present two issues of fact: 1st. Whether the petitioner made a demand upon the common council that the tax be levied, as provided for in the act under which the bonds were issued; and 2d. Whether there was, at the commencement of this proceeding, any money in the treasury of the city of Placerville belonging to the general fund.

It is ordered that the foregoing issues be referred to for trial.

We concur: Temple, J.; Sprague, J.; Crockett, J.

Wallace, J., did not participate in the decision of this cause.

JACKSON R. MYERS, Appellant, v. MAYOR and COMMON COUNCIL OF CITY OF PLACERVILLE, Respondents.

No. 2004; August 29, 1870.

RHODES, C. J.—The parties, instead of trying the issues which were certified to the district court for trial, have agreed to certain facts, which are: 1st. That at the commencement of this proceeding there was no money in the treasury of the city of Placerville belonging to the general fund; and 2d. That the only demand that the tax be levied was made by serving a copy of the written demand, mentioned in the stipulation, on the mayor and each member of the common council, at their respective places of business and not when assembled or organized or acting in their official capacity as the mayor and common council of said city, nor at the time or place of their meeting, as the mayor and common council.

It requires no argument to prove that such demand did not constitute a demand upon the mayor and common council to levy the tax. The persons named did not constitute the mayor and common council until they were assembled and organized as a body, and acting or ready to act in their official capacity.

Mandamus denied.

We concur: Temple, J.; Sprague, J.

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C. P. TWISS, Respondent, v. E. A. PREUSS, Appellant, and P. McDOWALL, Respondent, v. E. A. PREUSS, Appellant.

No. 2209; April 12, 1870.

**Appeal—Statement.—The Only Evidence the Court may Notice** on appeal, in respect of the fact that the statement in the record is the engrossed statement on which the motion for a new trial was heard, is the certificate required in that connection by the statute.

**Appeal—Statement.—On Appeal from an Order Denying a Motion** for a new trial when the certificate by the trial court is to

**the effect that the statement is "settled by adding thereto the amendments," etc., and it does not appear that any amendments were added, and what is offered by way of statement in the transcript is not shown on its face to be the engrossed statement on motion for a new trial, the court cannot consider the appeal.**

APPEAL from Seventh Judicial District, Los Angeles County.

Widney & Brunson for respondent; Howard & Sepulveda for appellant.

TEMPLE, J.—These two cases were tried together and by stipulation a joint appeal is taken from the judgment and order denying a new trial. Plaintiff objects to the statement on the motion for a new trial on the ground that it is not authenticated as required by law. The certificate of the judge settling the statement is as follows:

"The foregoing statement is settled by adding thereunto the amendments of plaintiff on April 20th, 1869."

It does not appear in any way that the amendments alluded to have ever been added as directed or that the statement in the transcript is the engrossed statement on motion for a new trial; on the contrary, the plain inference from the language of the certificate is that the statement to which it is appended does not include the proposed amendments, but they are still to be incorporated therewith before the judge would add the certificate required by the Practice Act. The certificate in the record would be entirely inappropriate in the engrossed statement which would include the amendments.

The Practice Act requires (section 195) that the statement when not agreed to shall be settled by the judge, and shall be accompanied by his certificate that "the same has been allowed by him and is correct." By no possible construction can the certificate in this case be held equivalent to that required by the Practice Act. It may be, as a matter of fact, that the statement in the record is the engrossed statement upon which the motion for a new trial was heard. But the only evidence of that fact we are at liberty to notice is the certificate required by the statute or the stipulation of the parties, neither of which is shown by the transcript.

It is thus: There is a stipulation signed by the attorneys of the plaintiff to the effect that the two appeals may be

heard together "the same as they were tried and as shown on the statement on motion for new trial," but the stipulation is not attached to the statement and does not identify it in any way, nor does it show that it has been settled or agreed to as required by law, and is not in substance even the stipulation contemplated by the one hundred and ninety-fifth section of the Practice Act.

The judgment-roll discloses no error and the judgment and order are affirmed.

We concur: Wallace, J.; Rhodes, C. J.; Sprague, J.; Crockett, J.

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JANE A. CLARK, Appellant, v. THOMAS SAWYER et al., Respondents.

No. 1675; April 12, 1870.

**Execution.—In Order to Establish a Title Through Judicial Proceedings** and subsequent execution of the judgment, one must be held to show a judgment not subject to be impeached for lack of jurisdiction, a proper writ of fieri facias issued on the judgment, and a sufficient conveyance on a sale made under the writ by the officer designated by law to make it.

**Execution—Expiration of Sheriff's Term of Office.**—On a writ of fieri facias coming into the hands of the sheriff of the then district of San Francisco, in 1850, another sheriff, newly elected and qualified as sheriff of the county of San Francisco, could not make a valid sale so as to vest the purchaser, or the grantee in the subsequent deed referring to such sale, with title to the property sold.

**Sheriff—Expiration of Term—Service of Process.**—A sheriff who has commenced the execution of process in his hands is bound to complete it, though he may, in the meantime, have been succeeded in his office by another incumbent.

**Sheriff—Abolition of Office—Service of Process.**—The statute which abolished the office of sheriff of the district of San Francisco provided that quoad process then in hand the office should still exist, and that its incumbent should have power to, and remain charged with the duty to, complete the enforcement of such process.

APPEAL from Fifteenth Judicial District, San Francisco County.

Action of ejectment.

J. P. Treadwell for appellant; Sharp & Sharp and Sharp & Lloyd for respondents.

See Clark v. Sawyer, 48 Cal. 133.

WALLACE, J.—The appellant (who claims under a deed executed by Bryant to Reuben Clark in 1853), having established, by proof, a legal title to the premises in the adverse possession of the respondents, the latter attempted to show in themselves an older deraignment from the same source of title.

In order to do this, they put in evidence the records of two judgments rendered in San Francisco, in the court of first instance, one in March, the other in April, 1850, in favor of Starkey, Janion & Co., and against Bryant.

They then proved that upon these judgments writs of fieri facias came to the hands of Sublett, the sheriff of the then district of San Francisco, and were levied by him upon the premises before the fifteenth day of April, 1850, at which time the court of first instance, and its officers, became superseded by the organization of the state government.

It appeared that the record of the Starkey, Janion judgments came into the lawful possession of the district court of the fourth judicial district before the nineteenth day of April, 1850, and on that day that tribunal, on motion of the attorney of Starkey, Janion & Co., made and entered an order in the following words:

"Starkey, Janion & Co.
v.
J. J. Bryant.

"Now at this day the court orders the sheriff to proceed to sell the property levied on under execution previously issued.

"LEVI PARSONS,
"District Judge.

"April 19th, 1850."

Upon the entry of this order a copy thereof duly certified was delivered to John C. Hays, who was the newly elected and qualified sheriff of the county of San Francisco. There were, also, placed in the hands of Hays two writs of venditioni exponas, issued upon and in furtherance of this order,

and he, thereupon, received from Sublett the two unsatisfied writs of fieri facias, originally issued to the latter, as district sheriff, from the court of first instance, and which he had already levied upon the premises in controversy.

Hays had no other process than the foregoing, and, acting under it, he, as sheriff of the county of San Francisco on the —— day of May, 1850, sold the premises to the respondents or their grantors, who, having purchased at the sale, received sheriff's deeds for the premises.

These deeds recited the fact that the writs of fieri facias had been issued from the court of first instance, directed to the sheriff of the district of San Francisco; that that officer had made a levy and seizure of the premises in pursuance thereof; that he had subsequently made return to the district court of the fourth judicial district of the fact that he had so made such levy and seizure; and that, thereupon, the last-named court had issued to John C. Hays, sheriff of the county of San Francisco, "two writs of venditioni exponas," by which "he was ordered and commanded to expose the said pieces, parcels and lots of land to sale," and, after the other usual recitals, as to advertisement, etc., proceeded to convey the premises to the grantees therein "as fully as I, the said John C. Hays, the sheriff aforesaid, can, may, or ought to, by virtue of the said writs and orders, and of the law in such case made and provided, grant, bargain, sell, convey," etc.

The appellant claimed at the trial that the sale, and the deed made in pursuance thereof, were void in law, but the court below was of the opinion that they were valid and sufficient to vest in the purchaser the title which Bryant had to the premises.

The jury were so instructed, and they having returned a verdict against the appellant, and an order having been entered denying her a new trial, the appeal is taken from the order and from the final judgment entered on the verdict.

We think that, upon the facts thus appearing, the sale of the premises made by Hays, as sheriff of the county of San Francisco, cannot be supported in point of law.

In order to establish in themselves a title through these judicial proceedings, the respondents must be held to show a judgment not subject to be impeached for lack of jurisdiction; a proper writ of fieri facias issued thereon, and a suffi-

cient conveyance, upon a sale, made under the writ by the officer designated by the law to make it.

We are of opinion that the writs issued from the old court of first instance directed, in terms, as they were, to the sheriff of the district of San Francisco, ex proprio vigore conferred exclusive authority upon that officer to make the levy, sale and conveyance in question.

This must be conceded, since he was not only distinctly named therein by his proper designation of office, but he was unquestionably the officer to whom the law then in force had committed the execution of such process; for the office of sheriff of the county of San Francisco was one not known to the system of civil administration, under which these writs were issued, and never, in fact, had an existence until after the supersedure of that system.

The sheriff of the district then, being himself the officer, whose official duty it was, under the law, to proceed to execute these writs of fieri facias, did not, and could not, relieve himself of the performance of that duty, by subsequently transferring those writs into the hands of the sheriff of the county of San Francisco, nor did such transfer confer any authority or impose any duty upon the latter officer to take steps for their enforcement. The circumstance, then, that Hays had these writs in his hands, at the time he made the sale, is of no import in determining the validity of that sale, for, in contemplation of law, they still remained in the custody of that officer, to whom they were originally directed, and whose duty it was to have them in his keeping.

The writs of fieri facias being thus out of the case, those of venditioni exponas fail for want of support. It is not the nature or office of the latter to confer power upon the sheriff, but only to hasten him in the execution of powers, supposed to be already vested in him: "the venditioni exponas adds not to his authority, but is to spur him on to sell": Clerk v. Withers, 6 Mod. Rep. 299; Taylor v. Doe, 13 How. (U. S.) 293, 14 L. Ed. 149.

As the sheriff of the district was the only officer who was vested with authority to sell, the order of April 19th, requiring "the sheriff" to proceed with the sale, must be considered as having been directed to him. Besides he had already levied the writs of fieri facias upon the premises, and

it is the settled rule of the common law that a sheriff, who has commenced the execution of process in his hands, is bound to complete it, even though he may have been, in the meantime, succeeded in his office by another incumbent: People ex rel. Dunn v. Boring, 8 Cal. 406, 68 Am. Dec. 331; Anthony v. Wessel, 9 Cal. 103.

A question might arise as to the strict applicability of this rule to the facts of this case, because it might be said that here the outgoing officer was not succeeded in his office, but that the office itself was superseded by the new system of government. But the act of February 28, 1850, by which that supersedure was brought about, adopted the rule of law we have mentioned, and applied it to the superseded sheriff. Section 34 of that act is as follows: "All writs . . . . and other process issued by the courts of first instance, and in the hands of the sheriff . . . . of such courts at the time they shall be superseded, shall be executed by such officers, and returned by them to the district courts of the proper counties, in the same manner, with like force and effect, and subject to the same provisions of law, as process issuing out of the district courts may be required by law to be executed and returned by the sheriff of counties": Laws of 1850, p. 80, sec. 34. So that the statute, while it, in the main, abolished the office of sheriff of the district, did not do so altogether, but provided that quoad process then in hand (as were the writs of fieri facias in Starkey, Janion & Co. v. Bryant) the office, otherwise superseded, should still exist, and that its incumbent should not only have the power, but should remain charged with the duty in that act expressly enjoined upon him, to complete their enforcement; and his performance of this duty might have been readily enforced by proper proceedings had for the purpose.

Entertaining, as we do, these views, the judgment and order denying a new trial must be reversed and the cause remanded, and it is so ordered.

I concur: Temple, J.

I concur in the judgment: Sprague, J.

Crockett, J., being disqualified, did not participate in the decision.

## THOMAS BROWN, Appellant, v. J. H. HOUSER et al., Respondents.

No. 1650; April 12, 1870.

**Appeal.—In Reversing a Judgment in a Cause Submitted** to the trial court on an agreed statement of facts, when the facts as stated are indefinite, and the record fails to show that the court relied on them alone, the appellate court cannot indicate the character of the judgment to be entered, but can only remand the cause for further proceedings.

**Appeal.—The Record Should Show the Action of the Court Below** in admitting or rejecting matter of proof and the exceptions, if any, in each instance, so that an aggrieved party may, through the instrumentality of his exceptions, have the points of grievance considered on appeal.

**Trial—Objections to Testimony—Exceptions.**—The fact that a cause is tried by the court without a jury is no reason why objections to testimony should not be promptly determined and exceptions formally taken.

APPEAL from Fifteenth Judicial District, San Francisco County.

J. P. Treadwell for appellant; Porter & Holladay for respondents.

WALLACE, J.—This was an action of ejectment tried before the court without the intervention of a jury. J. J. Bryant was the admitted owner of the premises in 1850. The appellant derives his claim through a conveyance by Bryant to Reuben Clark, made November 19, 1853, a conveyance of an undivided interest from the latter to George in 1855, a sheriff's deed to Treadwell in 1858, sufficient to convey to him all the title of Clark and George, and another conveyance from Treadwell to the appellant, made about March 24, 1863, when this action was commenced. These several conveyances vested the appellant with the legal title to the premises, unless it had, previously to 1853, passed from Bryant to the respondents. In order to show that it had, the respondents relied only upon the effect of a sheriff's sale of the premises in controversy upon proceedings had in the cause of Starkey, Janion

& Co. v. Bryant, and being the same which we have lately had under consideration in Clark v. Sawyer. We held in that case that those proceedings were ineffectual to pass the legal title of Bryant to purchasers at that sale. There, however, the only issue arising on the pleadings concerned the legal title to the premises in controversy, while here the respondents, besides setting up their alleged title in fee, have interposed an equitable defense.

At the trial no witnesses were sworn or examined by either party, but the case was submitted upon what is styled in the record here a "written statement of facts agreed to, upon which the case was submitted." Such a statement is authorized by section 180 of the Practice Act, and, when agreed to in due form, has the effect of a special verdict, which is that by which the jury find the facts only, "leaving the judgment to the court . . . . and those conclusions of fact must be so presented, as that nothing shall remain to the court, but to draw from them conclusions of law."

If there were, indeed, such a statement here, it would become our duty, in connection with the reversal of this judgment, to indicate the character of the judgment to be entered by the court below on the return of the cause. This could only be done, however, when the record makes it absolutely certain that the facts, upon which that court acted, are precisely those upon which we are proceeding here. On examination of the so-called "agreed statement," we discover that a considerable portion thereof (and which is very important as affecting the equitable defense here made) was not absolutely and definitely admitted as constituting a part of the facts before the court below, but was only to be considered by that court "if the court shall judge that the testimony, or any part of it, would be competent and admissible, if offered by the defendants and duly objected to by the plaintiff, [then] it, or so much of it as would be adjudged competent and admissible is to be taken as a further statement of agreed facts." It could not be determined until the court had ruled on the objections of the plaintiff whether any, or which, of the facts thus conditionally admitted became part of the facts of the case, the consideration of which would constitute an element in the judgment.

The record here shows no action of the court below admitting or rejecting any portion of these facts. If that court had refused to admit a portion of the facts contained in this conditional statement, an exception could have been taken by the party injured thereby, and through the instrumentality of that exception the ruling, in that respect, could have been reviewed here, and reversed, if erroneous. But in such case the evidence so excluded could not be regarded as constituting part of the facts upon which the judgment below was actually entered; on the contrary, its improper exclusion would be the very basis of the exception and reversal.

The court below should, under such circumstances, distinctly indicate by its ruling at the trial what portion of the evidence offered is admitted, and what portion is excluded as improper. In no other way can that degree of certainty, so desirable in judicial proceedings, be attained. The practice of receiving testimony subject to the objection of the opposite party is one productive of much confusion and possible injustice to litigants, and should not be indulged. Unless counsel may know, as the trial progresses, what particular evidence is actually admitted or excluded, it will be exceedingly difficult for them to determine upon the course best calculated to present the merits of the controversy upon its final determination.

There is no good reason why an objection, made to the admissibility of evidence on a trial before the court, should not be as promptly determined as though a jury were impaneled, and a due regard to the intelligent administration of justice requires it in the one case as much as in the other. Of course, we are not to be understood as intimating that the learned court below has given its sanction to such a practice, for here the offer of the evidence under reserved objections was the result of the stipulation of counsel made before the trial, and seems never to have been called to the attention of the court.

In view, however, of the degree of uncertainty attending the record in the particular mentioned, we do not feel at liberty to go farther than to reverse the judgment, and remand the case for further proceedings.

As we have already intimated, a portion of the evidence left in this doubtful situation concerns particularly the equitable defense, upon the sufficiency of which, we think, the

controversy must eventually be decided, and which rests upon the estoppel in pais against Bryant; notice of the equity of respondent brought home to Clarke, Treadwell and the appellant; whether these last were bona fide purchasers from Bryant, without notice of this equity; the particular times (with reference to November 19, 1853) at which respondents entered into possession of the premises; the character of that possession, and the like. And as the case must go back for retrial, we cannot forbear to remark that the equitable defense here pleaded can hardly be said to contain the essential elements of a bill in equity, so often held by this court to be necessary in setting up such a defense in an action of ejectment.

Judgment reversed, and cause remanded.

I concur: Temple, J.

I concur in the judgment: Sprague, J.

Crockett, J., being disqualified, did not participate in the decision.

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## AUGUSTIN BERNAL et al., Respondents, v. JUAN PABLO BERNAL et al., Appellants.

No. 2144; April 12, 1870.

**Appeal—Effect of Dismissal by Consent.**—When the court, by consent of the parties, dismisses an appeal as to the subject matter, it cannot at the same time let it stand as to fees and expenses allowed to referees in the cause, such being merely incidental to the appeal from the judgment or final decree.

**Partition — Compensation of Referees—Appeal.**—If both the plaintiffs and defendants in a partition suit are dissatisfied with the compensation awarded by order to referees, and if they themselves are the only parties necessary to an appeal from the order, reversal can be had in the court above by confessing error in that respect, provided the order is an appealable one.

**Partition.—The Notice of Appeal**, in the case of a partition suit, is to be served on each one of the parties concerned, since in such suits each party is adverse to the other.

ing to establish the fact that the deed did embrace the land. The evidence introduced by the defendants seems to establish that the title did not pass to plaintiffs by the deed first put in evidence by them. And the evidence does not show that they ever acquired title to the premises, unless it was included in this deed from Sutter, Jr., to Mesick, and there being no evidence upon that point, the plaintiffs did not prove title in themselves.

It is possible that the patent to John A. Sutter, which had been already put in evidence, contains sufficient recitals to show that it was issued in confirmation of one of the grants mentioned in this deed. If so, the court was justified in finding that the title to the demanded premises passed by it to Mesick. But the defendant, in his statement on his motion for a new trial, specifies as one of the grounds of his motion that the evidence does not show that the deed includes the premises in controversy. If there was evidence at the trial tending to establish this fact, it then became the duty of the plaintiff to have it inserted in the statement; and if the recital of the patent would show that fact, it should have been set out under the rule we have established. We must presume that all the evidence upon the specified points is in the transcript: Hidden v. Jordan, 28 Cal. 301.

The court, however, found that the title passed to Mesick from Sutter, Jr., by this deed, and this finding is duly excepted to by defendants. It is not even contended here that this finding is sustained by the evidence contained in the transcript, but on the trial the plaintiffs offered a deed from John A. Sutter, Jr., to Witztar and others, and a deed from Witztar (and his cotenants under that deed) to Mesick. This deed is said to include the land in controversy, but the deed was excluded upon objection on the part of defendants, on the ground that the acknowledgment was defective. The plaintiff has caused this acknowledgment to be inserted in the transcript, and insists that the deed ought to have been admitted, and that this court seeing from the facts of the whole case, as presented in the transcript, that, upon all the evidence received and offered, the plaintiffs ought to have recovered, will affirm the judgment, although the court arrived at its conclusion through a wrong channel. The appeal not being taken on the part of the plaintiff, he cannot complain of errors

to his detriment, and if he could, such errors would require a new trial for their correction. If the deed had been admitted, the defendants may have been able to show, nevertheless, that for some reason the plaintiffs ought not to be allowed to recover. To affirm this judgment upon the record would be to admit evidence upon one side in this court, and, to that extent, practically to deny the defendants the benefit of a trial at all.

The judgment is reversed and a new trial ordered.

We concur: Wallace, J.; Crockett, J.; Rhodes, C. J.; Sprague, J.

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## In the Matter of the Estate of MARIA JOSEFA SOTO DE STOKES, Deceased.

No. 1850; June 8, 1870.

**Administrator's Sale—Who cannot Appeal.**—An appeal from an order of the probate court confirming a sale of real estate will not be considered on its appearing that the appellant is interested in the matter only as a creditor of the husband of the deceased, whose estate is in process of settlement, and the property sold was separate property.

APPEAL from Probate Court, Monterey County.

Wm. Matthews, for Hills.

TEMPLE, J.—The first question necessary to be considered in this case is, whether the appellant, Hills, has such an interest in the subject matter affected by the proceedings appealed from as will authorize him to take this appeal. The facts upon which this question depends are the following:

Mrs. Stokes, being the owner of a large amount of real and personal property as her separate estate, died intestate, leaving as her heirs her husband, James Stokes, and several children. James Stokes was appointed administrator, and in that capacity, as is claimed, disposed of all the personal property belonging to the estate, and died leaving the estate not fully administered. His estate appears to be insolvent, and by a

settlement between his executor and the administrator de bonis non of Mrs. Stokes, was found to be indebted to the estate of Mrs. Stokes in the sum of thirty-five thousand dollars.

Upon the death of Mrs. Stokes her husband, James Stokes, inherited one-third of her property. The appellant is a creditor of James Stokes.

The administrator de bonis non of the estate of Mrs. Stokes procured an order to sell certain land belonging to her estate, and in pursuance of the order a sale was made, and this appeal is from the order of the probate court confirming the sale. The appellant is interested in saving the inheritance of James Stokes, in order that it may be assets in the hands of the executor of James Stokes for the payment of appellant's debt.

The Probate Act does not specifically name the parties who may appeal from these proceedings, but, of course, it can only be done by the parties to those proceedings, or those directly affected by them. The parties to the proceedings for the sale of land of a deceased person are those interested in the estate as heirs or devisees, and the creditors. The appellant belongs to neither of these classes. He had no right to appear or to be represented in these proceedings in the probate court, except by the executor of James Stokes, whose creditor he is.

As creditor of James Stokes he has a right to interfere to some extent in the estate of James Stokes, to compel a proper administration of the assets of that estate, to which he looks for payment, but there is no more propriety in allowing him to prosecute this appeal to protect the interests of that estate than there would be in allowing him, as creditor, to maintain an action of ejectment to recover land belonging to the estate. His proper remedy is to compel the executor of James Stokes to institute such proceedings, or, if he refuse, to have him removed, or otherwise made responsible.

The appeal is dismissed.

We concur: Sprague, J.; Wallace, J.; Crockett, J.; Rhodes, C. J.

# ESTELLA MAY REED, Respondent, v. UNION COPPER MINING CO. et al., Appellants.

No. 1958; June 10, 1870.

**Actions—Joinder of Causes Legal and Equitable.**—The Practice Act authorizes the joining of several causes of action, subject to certain restrictions, but contains no requirement that the causes of action thus united shall be either all of a legal or all of an equitable nature.

**Actions—Legal and Equitable Relief.**—Although both legal and equitable forms of relief may be obtained in the same forum, the same substantial differences between them exist now as of old, and to obtain the relief formerly administered by courts of equity one must establish the same facts as when relief was obtainable only in those courts.

**Equity.—One of the Main Distinctions Between Law and Equity** is that at law a party usually receives compensation in damages, while equity gives a more specific remedy according to the circumstances of the case, and generally only in those cases in which compensation in damages would not be a complete and adequate remedy.

**Equity.—In Order to Invoke Equity, Under the Practice Act,** the same circumstances must be made to appear as under the old system showing the inadequacy of the remedy at law, or some other ground of equitable interference.

**Ejectment—Bill of Discovery.—In Ejectment the Plaintiff cannot,** under California practice, require a bill of discovery in aid of his action, since under that practice he may probe the defendant's conscience by requiring an answer under oath or may call the defendant to the stand as a witness.

**Equity has No Jurisdiction of an Action for Damages Merely, Unless** under peculiar circumstances, where the party injured cannot maintain his action at law.

**Action—Joinder With Ejectment.—Two Causes of Action are Inconsistent,** as set up in an action of ejectment, if the defendant is asked to be found virtually a trespasser under the one, while under the other he is alleged to have entered as the plaintiff's guardian to manage the estate for the plaintiff; such causes cannot properly be joined.

**Actions—Joinder.—The Object of the Sixty-fourth Section of the Practice Act** was to authorize parties to unite causes of action which already existed, and not to give additional causes of action. It was not contemplated therein that the right to an account should follow the recovery in ejectment.

**Deeds—Parol to Explain.—When, of Many Tenants in Common,** among whom are a father and daughter, the former makes, for a nominal consideration, a deed to another absolute on its face and presenting no patent ambiguity, and on the same day this person makes, for the same consideration, a like deed to the daughter, parol evidence is not admissible years afterward to prove this second deed to have been intended as a mere confirmation to the daughter of the interest already held by her when such deed was made.

APPEAL from Eleventh Judicial District, Calaveras County.

Clark & Carpentier for respondent; H. & C. McAllister for appellants.

For subsequent opinion, see page 598, post.

TEMPLE, J.—The complaint in this case is in two parts. The first is a complaint to recover possession of the property in controversy, which is a mine, and damages for its detention. The second part is in the nature of a bill in equity, asking for an account of the rents and profits during the period of the ouster, and for the appointment of a receiver. In the statement of each cause of action the plaintiff claims to be the owner of two-thirteenths of the mine, but it does not appear from the complaint that any of the defendants claim any interest in it whatever.

Under the first count or cause of action the plaintiff has a complete remedy for the alleged wrong she has suffered, but she could not obtain, nor does she need, an account of the gold extracted from the premises during the time they were occupied by the defendants.

The complaint is demurred to, on the ground that two causes of action have been improperly united, in this: 1st. The first cause of action is at law, and the second in equity; 2d. The two causes of action do not both belong to any one class enumerated in section 64 of the Practice Act; and 3d. The two causes of action are inconsistent with each other.

The first objection finds no support in the Practice Act of this state. That act provides for only one form of action for the enforcement and protection of private rights and the redress and prevention of private wrongs. The plaintiff is required to state the facts constituting his cause of action in ordinary and concise language, and if those facts are estab-

lished, the court will give him the relief to which they entitle him, whether that relief be legal or equitable or both. In either case it is a civil action to be commenced and conducted under the same code of procedure. The Practice Act authorizes the joining of several causes of action, subject to certain restrictions, but contains no requirement that the causes of action thus united shall be either all of a legal or all of an equitable nature: Gates v. Kieff, 7 Cal. 125; Natoma Water & M. Co. v. Clarkin, 14 Cal. 547; More v. Massini, 32 Cal. 590.

The inherent and substantial difference between law and equity as two distinct and separate sciences, it is often said, has not been abolished by the Practice Act, nor, indeed, could it be, for it is a difference existing to some extent by definition. They are recognized as distinct jurisdictions or grounds of classifications by the constitution of the state, which confers original jurisdiction upon the district court and appellate jurisdiction upon this court of all cases in equity, and also of certain classes of cases in law. Although both species of relief are now obtainable in the same forum, the same substantial differences exist, and to entitle one to the relief formerly administered by courts of equity, he must establish the same facts as when relief was obtainable only in those courts. One of the main distinctions between the two jurisdictions is, that at law a party usually receives compensation in damages, while equity gives a more specific remedy according to the circumstances of the case, and generally only in those cases in which compensation in damages would not be a complete and adequate remedy, and under the Practice Act the same circumstances must be made to appear, showing the inadequacy of the remedy at law, or some other established ground of equitable interference.

In this action, as I have said, the plaintiff had an adequate and complete remedy at law. She could, in her action of ejectment, recover damages measured by the value of the rents and profits, and also the waste, if any, of the premises. She could not require a bill of discovery in aid of her action, for under our system she may probe the conscience of the defendant by requiring him to answer under oath, or she may call him as a witness upon the trial. One of the most common cases under the former system of divided jurisdictions, in which a bill for an account was sustained, was as auxiliary

to, or at least joined with, a bill of discovery. Under the present system this ground does not exist.

Equity has no jurisdiction of an action for damages merely, unless under peculiar circumstances, where the party injured cannot maintain his action at law. It is true that in certain cases he may bring his action for an injunction to stay future waste, and that having obtained jurisdiction for the purpose of prevention, the court proceeds to do complete justice, to avoid a multiplicity of suits. The satisfaction given for damages already committed is entirely incidental, and forms no ground of equitable jurisdiction, and the rule in such cases is often tersely expressed, "No injunction, no account." It has never been supposed that equity has any jurisdiction for the purpose of an account of damage already done. Equity does not deal in damages, and exists as a science solely because damages, which is almost the only relief known to the common law, is not always an adequate compensation for a wrong committed, or cannot always be obtained. The Practice Act has not changed the rule in this respect, and does not give equitable relief, when formerly it could not be had. No injunction is asked for in this case, nor is there any danger of future waste, and when it is admitted that the plaintiff can recover the same damages in his first count, it must follow that the second count cannot be sustained, unless she has shown some special reason for equitable interference.

The ground mainly relied upon in this case, to sustain this count of the complaint, is that the plaintiff is an infant. Formerly a party was required to establish his title or right of possession in an action at law in ejectment, before he could maintain a suit for mesne profits. After his title had been thus established, he was allowed, if an infant, in case where a stranger had intruded upon his land, either at law or in equity to compel an account of the rents and profits, and to charge the intruder as guardian or bailiff: 1 Story's Eq. Jur., sec. 511. That is to say, the infant was allowed to waive the tort and charge the intruder as though he had undertaken to manage his estate as guardian or bailiff.

It is not material now to inquire whether, under our system, a suit of this character could be maintained. The question is, whether such relief can be had in the same action

which is brought to establish the right, and to recover the land in an action of ejectment.

The foundation of the first cause of action is, that the defendants went upon the land as trespassers denying the title of plaintiff. The theory of the second count is, that they went upon the land in her employ as her guardian, agent or bailiff, to take care of the property for her benefit. The court is asked to establish these opposite conclusions from the same facts and by the same judgment, or rather it is asked to try the case upon two opposite and repugnant theories. To sustain the action of ejectment, the court must find that defendants were trespassers, to sustain the other, that they were in possession under some relation of trust and confidence, and that they were managing the estate for the benefit of the plaintiff. Thus the finding, to support either count, would show the plaintiff not entitled to the relief demanded in the other. The two causes of action are entirely inconsistent and ought not to have been joined: Lamport v. Abbott, 12 How. Pr. 341; Bradley v. Harkness, 26 Cal. 69, 76.

It is quite evident that plaintiff can find no support for this pleading in the second subdivision of the sixty-fourth section of the Practice Act. That provision has reference to such damages for the withholding of the premises as were formerly recoverable in an action of trespass for mesne rents and profits, which action was the natural consequence of and subsidiary to the action of ejectment. The modern action of ejectment was a fictitious proceeding. It was brought by a fictitious plaintiff against a casual ejector, and as a consequence of these fictions nominal damages only were recovered, and the real damages were obtained in the action of trespass which followed. It was natural that in doing away with these fictions the legislature should provide that all might be accomplished in one action. The object of this section was to authorize parties to unite causes of action which already existed, and not to give additional causes of action. The right to an account did not follow the recovery in ejectment, except under peculiar circumstances, and it cannot be supposed, therefore, that such remedy was contemplated by this section, especially when the right to this remedy depends upon facts inconsistent with those necessary to sustain the action of ejectment. That this must be so is more evident when we

remember that the rule of damages or compensation would be different in the two forms of action. The theory of the action of ejectment is, that the defendant is in the adverse possession. In such case the plaintiff is not entitled to recover the crops grown upon the land, or the actual profit made, but only the value of the use and occupation, and for waste or injury to the substance of the estate. Where an account is decreed in equity, the actual profits are recovered, on the ground that the defendant was agent, bailiff or guardian, or occupied some relation of trust or of control, or that, the title not being in dispute, the plaintiff was the owner of the identical thing severed from the soil, or in lieu of it its full value. In this particular case the trespass consisted in removing the substance of the estate itself, and the rule of damages would perhaps be the same, but the action more frequently has reference to agricultural land, where there might be a vast difference between the value of the crop or the actual profits and the value of the use of the land.

Although these considerations would dispose of the present appeal, yet, as the action for possession may be retried, it is not improper to express an opinion upon the question of the admissibility of the evidence offered to show what particular interest was conveyed by the deed from Meador to the plaintiff.

The plaintiff, who is an infant, was one of the original locators of the mine. The rights acquired under this location have never been lost or forfeited, but for some reason several of the original locators, apprehending that the location might not prove valid, made a second location, in which new location most of the original parties joined, but the plaintiff was omitted, and the name of Meador substituted for hers.

Afterward W. K. Reed, the father of plaintiff, conveyed to Meador for the nominal consideration of one hundred dollars, one-thirteenth of the mine—that being the exact portion to which each original locator was entitled. After this deed and on the same day, Meador conveyed to plaintiff, for a similar consideration, one-thirteenth. W. K. Reed then made a second conveyance to Meador, purporting to convey one-thirteenth. The consideration of this deed was two thousand dollars. Prior to the day on which these conveyances were

made, Meador had acquired and then held two-thirteenths of the mine.

The defendants sought to prove by parol that the particular thirteenth intended to be conveyed by Reed to Meador in the first conveyance was the thirteenth claimed by plaintiff under the first location. That the deed from Meador to plaintiff was to confirm plaintiff's title to this thirteenth, and that Reed, by his second deed, attempted to reconvey this same interest of his daughter to Meador.

The counsel for defendants cites numerous authorities, which, as I understand them, tend to establish three propositions within the reason of which it is claimed this case falls: First. Parol evidence will be received, when necessary, of the circumstances under which the deed was executed, to place the court in the position of the parties and to enable it to apply the language of the instrument to the proper subject matter; Second. Even where no fraud or mistake is alleged, parol evidence will be received to show that a deed absolute on its face is a mortgage; and Third. Parol evidence is admissible to show whether the consideration of a deed to a married woman was her separate property, or belonged to the community, and thereby to establish the status of the property conveyed as separate or community property.

The plaintiff disputes neither of these propositions, but denies that this case is within them.

In this discussion I shall speak of the first deed, as the same reasoning applies to all. In this deed there is no patent ambiguity. On its face it seems certain in every respect. It suggests no doubt as to the parties, the consideration, the property conveyed, or the estate or interest in it which was intended to pass. Nor, interpreted by any ordinary rules of construction, does the evidence received or offered tend to raise any doubt in any of these respects, but, having established a thirteenth as an understood division of the mine among the original locators, each being recognized as a separate source or origin of title to the different interests held, it is contended that evidence is competent to show which of these original interests was conveyed. It is not pretended that there is any doubt as to the thing of which this is a fractional part. The unit is the mine. The fraction, of course, cannot

be ambiguous of itself. Each thirteenth is the exact equivalent of each other thirteenth. They are absolutely indistinguishable from each other. The evidence cannot, therefore, be intended to identify the thirteenth or fractional part conveyed, but to show that no interest really passed, or that it was a less interest, or was subject to some encumbrance not mentioned in the deed. But to do this would be to contradict the deed or to change its effect, or to add conditions not expressed in it.

Suppose, for instance, one of the two thirteenths owned by Meador had been conveyed to him after it had been mortgaged, and was taken cum onere, and the other was clear. If Meador then had conveyed an interest equal to one-thirteenth of the mine, saying nothing in the conveyance to make it subject to the encumbrance, the effect of the conveyance would be, that the purchaser would take a thirteenth unencumbered. If parol evidence could then be received to show that the encumbered interest was intended, it would change the legal effect of the conveyance, and make a contract for the parties differing materially from the one they had executed. To admit such evidence in this case would be to defeat the deed entirely, for it would show that no interest at all passed.

The case is not at all analogous to the cases cited, in which parol evidence has been received to prove a deed absolute on its face a mortgage. Those cases are professedly based upon the peculiar doctrine of equity in regard to mortgages, which grew up from the right of redemption formerly allowed by those courts, although by the terms of the conveyance the estate had been forfeited. In these cases parol evidence was admitted to show the relation between the parties, and the circumstances under which the instrument was executed, not for the purpose of contradicting or varying the deed, but, as was said, to establish an equity superior to its terms: Peirce v. Robinson, 13 Cal. 116, 125. This right to show the intention of the parties by parol evidence is claimed to be incident to the relation of mortgagor and mortgagee, and is not a general rule of evidence. The defendants here do not attempt to establish a superior equity to control the terms of the deed, but to defeat the legal effect of its language by parol evidence.

Neither does this case fall within the third proposition, nor is it at all analogous to it. In that case the evidence does not

change the effect of the deed in any respect. In any event the title has undoubtedly passed to the wife as granted, but if the consideration for the conveyance was from the community, the law of the marital relation makes it common property, and by the same law the husband can dispose of it. I think the evidence was properly excluded.

The questions raised by Oakes Ames in his appeal, so far as they have not already been considered in this opinion, relate principally to objections to the evidence, which may not exist or be raised upon the new trial. It is evident that the action cannot be maintained against those not in possession at the time suit was brought, and the fact that rents and profits are sued for does not authorize the plaintiff to join as defendants persons whose possession had entirely ceased before the action was commenced. And if upon the new trial this should appear to be true of any of the defendants, they will be entitled to judgment.

I think the demurrer should be sustained.

CROCKETT, J.—As I construe section 64 of the Practice Act, there was no misjoinder of causes of action in this case. Under the second subdivision of that section, there may be united in one action "claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same." Under our code, legal and equitable remedies may be enforced in the same action, provided they fall within either one of the subdivisions of section 64. In the first cause of action stated in the complaint, the plaintiff seeks to recover "specific real property," to wit, two-thirteenths of a mine; and in the second cause of action, damages for waste committed on the same mine, "and the rents and profits of the same." It is true, the damages for waste and the rents and profits might be recovered under the first cause of action stated in the complaint; but in many cases, of which this is perhaps an example, it would be impossible to ascertain the waste or the rents and profits without the statement of an account. The working of an extensive and valuable mine for a series of years, involving large expenditures, and the sale of its products from time to time, amounting, it may be, to hundreds of thousands of dollars, could not be ascertained,

with any reasonable degree of accuracy, without a careful accounting, based upon information to be derived, chiefly perhaps, from the books and papers, officers and agents of the defendants. I perceive no valid reason why this accounting may not be had, under section 64, in the same action for the recovery of the mine or an interest therein. It is said that this cannot be done because the action to recover the mine is in the nature of trespass, whilst the action for an accounting is founded on contract. This would doubtless be a valid reason why the two actions could not be united at common law. But was not this precisely one of the reforms contemplated by the second subdivision of section 64 above quoted? Does not that section expressly enact that there may be united with the action to recover the property a demand for waste and for rents and profits? The sole purpose of that section was to avoid a multiplicity of suits, and a needless circuity of action; and though a demand for an accounting for waste and for rents and profits may, technically speaking, be deemed to be founded on an assumption that the defendants were not trespassers, nevertheless we can perceive no practical inconvenience to result from uniting with an action for the possession a demand for waste and for rents and profits, to be ascertained by an accounting; and inasmuch as the statute, without a forced interpretation of its language, and without doing violence to its spirit, appears to admit of that interpretation, we perceive no reason why such a course of procedure should be deemed objectionable.

In such cases, if the court should deem it advisable to try the action for the possession first, an accounting would, of course, be needless, if the plaintiff should fail in the action at law. On the other hand, if the plaintiff should establish his right to the possession, the accounting might then be had before the final judgment was entered. But it is sufficient, on this point, to say that, in my opinion, the statute authorizes this course of proceeding; and I can perceive no practical inconvenience to result from it.

I concur with Justice Temple in the opinion that the court properly excluded the parol evidence offered by the defendants, for the purpose of showing what particular thirteenth of the mine was intended to pass by the deed from Meador to the plaintiff. The effect of the evidence, if admitted, would

have been to defeat the deed altogether as an operative conveyance, and to have shown that the plaintiff acquired nothing thereby, notwithstanding Meador had an interest which would have passed by the terms of the deed. This would have been directly to contradict the deed by parol evidence, which cannot be done.

But it appears from the findings and proofs that some of the defendants were not in possession of the mine at the time of the institution of the action, nor at any time after November, 1863; but the court awards against such of the defendants as were in possession prior to November, 1863, the proportion of the profits and income of the mine to which the plaintiff was entitled up to that date, and against such of the defendants as subsequently had the exclusive possession, the plaintiff's proportion of the income and profits which subsequently accrued. In this the court erred. Section 64 of the Practice Act confers no authority to unite with an action for the recovery of real estate a demand for rents and profits or for waste, against parties not in possession, and who are not shown to have any interest in common with those in the actual possession. The action to recover the possession must be brought against those in the actual possession and those only. But if the plaintiff was permitted to bring into that action all those who, at some prior time, had wrongfully received the rents and profits, or committed waste upon the property, and could recover against each one severally his proportion of the rents and profits received, or his share of the damages for waste committed, it is evident that a dozen or more independent actions, having no proper relation to each other, and with defendants having no community of interests, would thus be consolidated into a confused mass, incapable of intelligent adjudication. The Practice Act contemplates no such mingling together in one action of heterogeneous and often discordant elements, having no necessary or proper relation to each other. In my opinion, the accounting should have been confined to the parties in possession, when the action was commenced, and that the other defendants were entitled to judgment.

For this reason, the judgment ought to be reversed, and it is so ordered.

We concur: Sprague, J.; Rhodes, C. J.

ESTELLA MAY REED, Respondent, v. UNION COPPER MINING CO., Appellant.

No. 1958; August 4, 1870.

CROCKETT, J.—From the opinion recently delivered in this cause, it appears that we found no error in so much of the judgment of the court below as adjudged to the plaintiff the title and right of possession to two undivided thirteenth parts of the mine and mining ground in contest; nor in so much thereof as awarded to her as against the Union Copper Mining Company the sum of one hundred and twenty-four thousand five hundred and ninety-eight dollars, being the amount found to be due to her from said company on an equitable accounting. But we held to be erroneous so much of the judgment as awarded to the plaintiff the sum of nineteen thousand eight hundred and eight dollars as against the defendants C. T. Meador, James Littlehale, Henry Balch, Thomas McCarthy, Agnes McCarthy, C. P. Tolor, Thomas Hardy, Oakes Ames, P. W. Freeman, John H. Swain and Reuben Meador, who were not in possession of the mine at the commencement of the action; and for this error we ordered the judgment to be reversed, and the cause remanded for a new trial. But after the filing of our former opinion, the plaintiff in due time presented her petition for a modification of the judgment; and on reflection, we are convinced there is no reason why the parties should be put to the expense and delay of another trial. The facts are all ascertained and an accounting has been had at a great expense; and it only remains for the court to pronounce the proper judgment.

Our former order directing a new trial is therefore set aside, and the judgment of the district court is affirmed, except so much thereof as awards to the plaintiff the sum of nineteen thousand eight hundred and eight dollars as against the said C. T. Meador and other defendants above named; and as to that portion of said judgment the same is reversed; and the district court is ordered to modify its judgment accordingly, and to dismiss the action as to the above-named defendants.

We concur: Rhodes, C. J.; Sprague, J.

## THE INIMITABLE COPPER MINING CO., Appellant, v. UNION COPPER MINING CO., Respondent.

No. 2060; July 5, 1870.

**Mining Claims—Subsequent Rules of District.**—The owners of a mining claim, having consistently with mining usages at the time of locating, posted at each end of the claim notices: "We, the undersigned, do claim 1950 feet in this lead or lode, it being the Reed lead, with all dips, spurs, angles and cross-leads"—cannot be affected by any by-laws or mining rules of the district, subsequently made, so as to have their claim, thus published, rendered a less one.

**Mining Claims.—The Words "Lead" and "Vein"** are to be taken as the equivalents of "lode" and "ledge."

APPEAL from Eleventh Judicial District, Calaveras County.

Patterson, Wallace & Stow and Clarke & Carpentier for appellant; H. & C. McAllister for respondent.

TEMPLE, J.—The plaintiff and defendant own each a mining claim in the Copper Canyon Mining District. The defendant's claim was first located, and is nineteen hundred and fifty feet in length by three hundred feet in width. The defendant's claim is along one side of this parallelogram. The defendants, in working their lead, followed the ledge, as is claimed, outside of their lateral boundaries, and into the boundaries of the plaintiff's claim. The plaintiff contends that the claims are what miners call square locations, while the defendant contends the locations are of a lode or ledge, and upon this question the case depends.

The plaintiff put in evidence certain by-laws or mining rules of the district, of which the third article is as follows: "Article 3. A miner shall be entitled to one claim by location on a lead of one hundred and fifty (150) feet in length and three hundred (300) feet in width: any miner discovering a new lead or vein shall be entitled to an extra claim of the above extent."

These rules were established on the third day of August, 1860, after the location of defendant's claim, which was made

July 31, 1860. In locating the claim defendant's grantors posted notices on each end of the claim, according to the custom of miners, in which they say "we the undersigned do claim 1950 feet on this lead or lode, it being the Reed lead, with all dips, spurs, angles and cross-leads." At the time of this location, there does not appear to have been any mining rules in force at this place, and there was nothing to prevent the locators of the defendant's claim from making a location in any manner recognized in mining usages. But we think the rule invoked not inconsistent with this location. It is true the word "lead," as applied to mines, may have a more extensive meaning than the word "lode" or "ledge," but its meaning in this particular instance must be ascertained in part from the subject matter to which it is applied. There is no evidence that any claim had been taken prior to that time, except the defendant's, and that was a lode known as the Reed lead, and was claimed with all the dips, spurs, and angles thereof. The rule itself uses the word "lead" as equivalent to "vein," for it provides that "any miner discovering a new 'lead or vein' shall be entitled to an extra claim." The one hundred and fifty feet in length is certainly along the lead, whatever it may mean, and evidently was intended to be upon a lead, which had been discovered and ascertained; and the evidence shows that this was understood by the miners to apply to the ledge or lode, which was supposed to contain the valuable metal for which the locations were made.

The judgment and order are, therefore, affirmed.

We concur: Sprague, J.; Rhodes, C. J.

Wallace, J., being disqualified, did not participate in the decision of this cause.

EDWARD BENDER, Respondent, v. MARIA L. PALMER, Appellant.

No. 1883; July 9, 1870.

**Mechanic's Lien.—When Materials are Furnished or Work Done,** free from any contract to give credit, and a debt in personam is thereby created against the owner of the premises, there is no reason why the materialman or laborer may not proceed at once, both to record his lien upon the property under the statute and immediately to enforce it by action.

**Mechanic's Lien—Government Land.—A Mechanic's Lien Right,** accruing against a building on government land to which the person in possession, for whom the building was constructed, had not yet acquired full title, is not lost by transfer of the possession of the land; but those entering successively under such person are concluded, even the final taker to whom the complete title is granted.

APPEAL from Third Judicial District, Santa Cruz County.

F. J. McCann for respondent; C. B. Younger for appellant.

WALLACE, J.—The plaintiff, a materialman, furnished to Calderwood certain materials intended to be and in fact subsequently used by the latter in the erection of a building upon a town lot in Santa Cruz, of which he was at the time in possession, claiming to be the owner.

This action is brought to foreclose the lien asserted by the plaintiff under the statute of April 26, 1862, in relation to liens of mechanics and others. After the materials had been furnished, and while the building was being erected, or, it may have been, after its actual completion, Calderwood sold the premises to Dreman, who subsequently conveyed them to the defendant Maria.

The court below entered a decree directing a sale of the premises to satisfy the lien, and from this decree the defendant appeals.

That Bender furnished the materials and filed his sworn statement, correctly setting forth his claim, is not questioned here, but the point is made that his lien became lost, because, as is said, this filing was not done within thirty days after the

completion of the building—but was done before the building was completed at all.

It is argued that the fact of completion must have occurred before the right to file the claim accrues, and that the filing must be within thirty days after the event and not before the thirty days commence to run, nor after they have expired.

It is clear that if a building be completed, the claim for a lien cannot be filed after the lapse of thirty days from that completion, but we do not see, under the provisions of the statute, why a laborer may not, when his work is fully done, or a lumber merchant, when his materials are completely furnished, make and file his claim for a lien, even though, at that particular time, the building itself may not have attained completion. Why should he wait upon the others, when his own part is completed? He has done everything which entitles him to obtain his lien and to hold it for his own protection. And besides, if the fact of the actual completion of the building is an indispensable condition precedent to the laborer or materialman obtaining his lien, he may be delayed indefinitely at the mere caprice of others over whom he has no control—the owner of the improvement, for instance, who may not choose that it shall be completed at all.

But it is said that the construction which allows the materialman to place a lien on the premises before the building is completed must unavoidably lead to the result that he may also bring his action to enforce that lien before the completion.

It is true that such a result may in some cases follow, upon the view we have announced. When materials are furnished, or work done, free from any contract whatever to give credit, and a debt in personam is thereby created against the owner of the premises, as is the case here, we cannot see why the laborer or materialman may not proceed at once, both to record his lien upon the property under the statute, and also immediately enforce it by action.

The security provided by law for the payment of a debt payable in presenti ought to be one capable of instant enforcement, otherwise the debt may become lost, before the lien becomes available at all.

The next point urged on behalf of appellant concerns the ownership of the property upon which the building was erected. Section 4 of the statute of 1862 provided that "the

land upon which any buildings . . . . shall be erected or constructed . . . . shall also be subject to the lien, . . . . if at the time the contract was made, etc., the said land belonged to the person who caused the said building . . . . to be constructed or repaired. But if such person owned less than a fee simple estate in such land, then only his interest therein shall be subject to such lien."

It seems that at the time the plaintiff furnished the materials, Calderwood was in possession of the land, claiming to be its owner, and was building a dwelling-house thereon; this was in December, 1865. In March, 1866, Calderwood conveyed the premises to Samuel Drennan, and in June following the defendant, Maria, took possession by permission of Drennan. In July, 1866, Drennan conveyed to the defendant Maria, and gave her a bond of indemnity against the liens in controversy here.

The ultimate fee of the land being during all this time in the government of the United States, Congress, after the conveyance to defendant, Maria, granted the title of the United States to the corporate authorities of the town of Santa Cruz, in trust, however, to convey to parties occupying at the date of the passage of the act. And in December, 1866, the defendant, Maria, obtained a conveyance in fee of the premises from the town authorities, as being the occupant of the premises.

It is now claimed that the acquisition of the absolute title in fee, thus subsequently accomplished, operates to displace the lien which might otherwise have been enforced against these premises.

We suppose that if the title of the defendant were now the same as when she first acquired it from Drennan, it would hardly have been claimed that such a result would follow. Certainly Calderwood himself, had he remained in the possession of the premises, as he was when the building was erected, could not have been permitted to defeat this lien by merely pointing to the true title as outstanding in the government of the United States. And it is clear, too, that those who successively entered under him, entering into possession as they did, in subordination to his title, such as it was, must in that respect have been concluded, as he would have been concluded. And if this be so, would he or they occupy a more

formidable position by the subsequent acquisition of the outstanding title? We think not. And especially would this appear to be so, when, as here, the better title has been acquired because and as a consequence of the possession and claim of title held in the first instance. We think that it must still be regarded for the purpose of this action as the same possession and title which Calderwood claimed, only confirmed and made definitely valid in the hands of his successors.

There is nothing in the other points urged on behalf of the appellant.

The judgment is affirmed with twenty-five per cent damages and costs.

We concur: Sprague, J.; Temple, J.; Crockett, J.

I dissent: Rhodes, C. J.

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## PEDRO RODRIGUEZ, Respondent, v. SAMUEL COMSTOCK, Appellant.

No. 2001; July 19, 1870.

**New Trial—Insufficiency of Evidence.—A Party Moving for a New Trial** on the ground that the evidence was insufficient to support the findings must specify in his statement the respects in which the evidence failed of sufficiency.

**Appeal.—Where There has Been a Substantial Conflict of Evidence** the findings of the trial court will not be disturbed unless the evidence was insufficient to base them on.

APPEAL from Third Judicial District, Santa Cruz County.

R. F. Peckham for respondent; S. F. & L. Reynolds for appellant.

See Rodriguez v. Comstock, 24 Cal. 85.

CROCKETT, J.—If it be assumed that the findings of fact are correct and are in accordance with the proofs, it is clear

the conclusions of law are proper. The facts as found are, briefly, that in 1823 Sebastian Rodriguez was placed in possession of the rancho in contest by the Mexican authorities; that it is not true that at any time there was ever made or delivered by said authorities to said Sebastian and to Alexander Rodriguez, jointly, a concession or grant of said land or any part of it, nor the possession thereof, nor did they have a joint possession in any manner; that in 1827 Cooper entered as the tenant of Sebastian and surrendered the possession to him in 1831, at which time Sebastian entered into the sole and exclusive occupation, which continued until 1855; that whilst so in possession he invited said Alexander to occupy a portion of said lands; and that the only possession which Alexander ever had was by the license of Sebastian; that in 1834 Alexander preferred, before Governor Figueroa, a claim to some interest in said lands, by virtue of a pretended grant or concession alleged to have been made to himself, Sebastian and another brother in 1823, but such right was never recognized by any of the Mexican officials; that the assertion of such right by Alexander produced a difficulty between him and Sebastian, which led to the removal of Alexander from the ranch in 1836, and from thence until his death, in 1848, Alexander never possessed or occupied any portion of it or made any further pretensions to an interest therein; that in 1836 Alexander was a partizan of Guiterrez, then the governor of California, and complained to him that he had no part in said ranch, and the governor thereupon told Sebastian that if he did not petition for said ranch jointly with Alexander, "he should lose it for all time to come"; that, influenced by this fear, Sebastian united with Alexander, in 1836, in a petition to the governor for a grant to the two jointly; that said petition was referred to the ayuntamiento of Monterey for a report, but no further action was ever had by the governor on said petition, and no grant or concession was ever made or issued, or ordered to be made or issued, to the two jointly; that in 1837 Sebastian petitioned Alvarado, who was then the governor, for a grant to him of the said ranch, whereupon the governor signed and issued a decree reciting the petition and declaring that he acceded to it; that in pursuance of said decree the judicial possession was delivered to Sebastian in November, 1837; that in 1852 Sebastian presented his petition to the land

commission for a confirmation of his title, founded upon the petition to Alvarado, his decree on the petition and the judicial possession under it; that the claim was finally confirmed and a patent for the land was duly issued to Sebastian in 1860; that the defendants in the cross-complaint have the title of Sebastian under the patent and the decree of confirmation, and the defendants in the original action, Comstock and others, have succeeded by mesne conveyances to one undivided sixth part of whatsoever pretended interest, the said Alexander had in and to said ranch, but, in fact, he never had any interest therein; that no claim or assertion of title to any portion of the ranch by said Alexander, or by any person claiming under him, has ever been confirmed or recognized by the United States; that no false or fraudulent representations were made by Sebastian or on his behalf to Alvarado to induce him to make the decree of 1837; and that in obtaining the patent Sebastian had no relations of trust or confidence toward the said Alexander, or any person claiming under him, nor was he guilty of any fraud, concealment or misrepresentation in procuring the confirmation and patent.

If these be the facts, it is too plain to admit of discussion not only that the title was in Sebastian, and is now in those deraigning title under him, but also that Alexander and those claiming under him have no equities which entitle them to relief, nor any title which a court of justice will recognize. But it is claimed by counsel that the findings are not supported by the evidence, and that a new trial should be granted on this ground. But we have a grave doubt whether the appellants are in a condition to raise this question on this appeal. On the motion for new trial, they failed to specify wherein the evidence was insufficient to support the judgment, except by a vague reference to the exceptions to the findings; and we are not inclined to encourage so loose a practice. It would, however, be a profitless task to analyze the evidence in order to ascertain on which side it preponderates. It suffices to say on this point that in the most favorable view that can be taken of it for the appellants there is a substantial conflict in the evidence; and after a careful examination of it, our impression is that the findings are fully supported by it. But however this may be, it is indisputable that there is, at least, a substantial conflict in it; and in such cases we never disturb the

findings on the ground that they were not justified by the evidence.

Judgment affirmed.

We concur: Sprague, J.; Temple, J.; Rhodes, C. J.

Mr. Justice Wallace, being disqualified, did not participate in the decision.

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## P. A. MILLER, Appellant, v. BOARD OF EDUCATION OF SACRAMENTO COUNTY, Respondent.

No. 2491; July 21, 1870.

**Appeal—Presumptions.—So Far as the Evidence Below was Conflicting,** the presumptions are in favor of the findings of the trial court and the judgment thereupon.

**Building Contract.—In Payment to a Contractor for Erecting a** building, deduction cannot be made for money given, without his prior authority or subsequent ratification, to satisfy a demand by a subcontractor.

**Building Contractor.—A Payment made to a Subcontractor and Charged** to the account of the contractor without authority by him first given is validated by a ratification by the contractor afterward.

**Building Contract.—If a Person has Furnished Materials as a** subcontractor, and other materials at the sole instance of the owner, any ratification by the contractor of a payment by such owner to such subcontractor, deducted from the contractor's account, is presumed to have applied no further than to the amount of what was due under the subcontract.

APPEAL from Sixth Judicial District, Sacramento County.

L. P. Taylor and J. H. McKune for appellant; Robt. C. Clark for respondent.

See Miller v. Board of Education, 44 Cal. 166.

TEMPLE, J.—Under a contract with the defendant the plaintiff built a schoolhouse in the city of Sacramento. The building was completed and accepted, and this action is brought to recover a balance alleged to be due on the con-

tract. The defendant pleaded payment, and this controversy arises in regard to the sum of fourteen hundred and fifty-two dollars and fifty cents, which was paid by the defendant to Avery on account of lumber sold by him to one Austin, a subcontractor under the plaintiff. The defendant claims that this payment was authorized by the plaintiff, or that the payment having been made for him, or on his account, was afterward approved and ratified.

Judgment was rendered for the defendant, and this appeal is from an order denying plaintiff's motion for a new trial.

So far as the evidence is conflicting, the presumptions are in favor of the judgment, and the plaintiff relies for a reversal upon the evidence offered by the defendants and the evidence of the plaintiff so far as it is uncontradicted.

The only witnesses called by the defendant were Hill and Avery, both of whom were members of the board of education. Hill, who was city superintendent of public schools, testifies that he attended to the disbursing of all the money; and it appears that no payments were made without first obtaining a certificate from the architect and the receipt of plaintiff. Hill also testifies that about the time of the completion of the building Avery expressed a desire to have his bill against Austin paid out of the moneys due plaintiff on the contract; that Avery afterward told him he had seen Miller, that Miller said it was all right, and that he had better pay him out of that money, and thereupon he paid Avery the amount of Austin's bill and took Avery's receipt. Sometime during the following week he met plaintiff and told him he had paid Avery's bill, and plaintiff thereupon said: "I am glad of it; it's all right." That afterward plaintiff was present at a meeting of the board at which this bill was mentioned as having been paid, and he then made no objection. It appears, however, from the testimony of this witness that prior to the payment of Austin's bill the plaintiff had complained to Hill of Austin's accounts and repeatedly said he wished the money paid to him, plaintiff, that he might settle this bill himself, and that after the payment he complained that the whole bill ought not to have been paid, as a portion of the lumber was not used in the building, and although at the time he was present at the meeting of the board, he made no specific complaint on account of

the payment of this bill, he did several times say he had given a good bond and wished to pay these debts himself. It also appears that Hill knew the nature of the contract between plaintiff and Austin.

Avery testifies that he called upon plaintiff for the balance of the bill, and plaintiff said he did not know that the bill was correct; that he would have to get Austin's approval, and then he (plaintiff) would pay it. He then went to Hill and got the money, without showing the bill to plaintiff as approved by Austin.

The uncontradicted evidence of plaintiff shows that five or six hundred dollars of that bill was for lumber not used in this building, and a portion for lumber used by Austin in extra work performed for defendant by Austin.

From the evidence it is perfectly manifest that the disbursement to Avery was made not only without any authority from Miller, but against his known wishes repeatedly expressed, and for which he had given the good reason that he was dissatisfied with Austin's accounts. It does not appear that plaintiff was indebted to Austin in any sum whatever, and as to a large portion of the sum paid he is shown to have been under no obligation to pay, either moral or legal. If, however, he authorized Hill to make the disbursement as his agent, he is undoubtedly bound by it, and it is equally clear that if, after the act had been done, he, with full knowledge of all the material facts, ratified the act and adopted it as his own, such ratification will have the same effect as an original authorization. There seems to have been a controversy between Hill and plaintiff in regard to this bill, the plaintiff claiming the privilege and right to settle it himself, because he doubted the accounts of Austin, and Hill, as agent for defendant, claiming the right to pay it, because of some qualified liability on the part of the defendant to Austin as a subcontractor. Hill was acting in the matter solely to protect the defendant. When, therefore, Hill informed plaintiff that he had paid Avery's bill, plaintiff must have understood him as having reference to a bill for materials used in the construction of the building, and for which it was supposed the defendant was in some way liable. Supposing himself under some obligation to save the defendant from such liability, he acquiesced in the payment, though evidently still dissatisfied and claiming that, as he had

indemnified the board, he ought to have been allowed to settle the bill himself.

We attach no importance whatever to the evidence, which shows that at the meeting of the board, at which the plaintiff was present, the amount of Austin's bill was mentioned and plaintiff made no objection. It is shown by the testimony of Avery that he did not know whether Austin's bill was correct, and although he manifests a desire to call in question the extent of his indebtedness to Austin, he acquiesced in the payment, not because he admitted his indebtedness to Austin, but because of his supposed liability to the defendant to save it from the claim of his subcontractor.

It is perfectly clear, therefore, to our minds that the ratification of the act of Hill (which, for the purposes of this appeal, must be taken to have been made as proven by defendant) must be confined to the amount due to Austin for materials used in the construction of the building in question under the contract with Miller. The motion for a new trial ought, therefore, to have been granted.

Order and judgment reversed and a new trial ordered.

We concur: Wallace, J.; Crockett, J.; Rhodes, C. J.; Sprague, J.

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## T. P. MADDEN et al., Respondents, v. FRANK ASHMAN et al., Appellants.

No. 2161; July 21, 1870.

**Limitation of Actions—Evidence.—The Plea of the Statute of Limitations** or any mere matter of avoidance is not in the nature of a cross-complaint, to be met by further pleadings. The plaintiff may, on the pleadings as they stand, introduce any evidence which will avoid the effect of the new matter.

**Nonsuit—Denial—Appeal.—If a Defendant, After Denial** of his motion for a nonsuit, proceeds with his evidence and thereupon the supposed defects are cured, the denial is not good matter for an appeal.

**Boundaries.—Where on Appeal a Point has Reference to a Boundary** line left indefinite in the statement, by reason of the absence of maps referred to in the evidence, the court deeming the evidence conflicting may on that ground refuse to disturb the judgment.

**Boundaries—Navigable Stream.—Where a Surveyor's Straight and angular lines along a navigable stream are concerned in the map of a government survey, it is not to be supposed that the government meant to reserve the small and useless parcels between these and the banks. Where there is no natural boundary the line of survey will determine the boundary, but where the call is for a navigable stream, the only necessity for a survey is for purposes of computation.**

APPEAL from Sixth Judicial District, Sacramento County.

Cadwallader for respondents; Sturr for appellants.

TEMPLE, J.—Action to recover land situated in the county of Sacramento. The defendant set up the statute of limitations. The plaintiff derived title from a Mexican grant and under a patent issued within five years before the commencement of the action. The defendants contend that having established an adverse possession of more than five years, the plaintiff cannot avail himself of the exception in the limitation act in favor of titles derived from the Mexican government unless such title is pleaded.

The plea of the statute of limitations or any mere matter of avoidance is not a cross-complaint, which requires an answer or reply on the part of the plaintiff, and if a replication had been filed setting up the facts which constitute the exception to the general statute, such reply would have been unauthorized. Such matters are deemed controverted, and the plaintiff may introduce any evidence which will avoid the effect of such new matter without pleading it.

The motion for a nonsuit was properly denied. The testimony of the plaintiff made a prima facie case, but if this were otherwise, the defendants did not rely upon their motion, but proceeded to introduce evidence and the supposed defects were afterward cured. The description in the deeds showing the deraignment from Mesick to the plaintiff seems to be identical with that in the complaint, and evidence was introduced which tended to show the defendants within that description. Indeed, this is admitted in the answer.

There is some confusion as to the south line of the plaintiff's land, and there may be some doubt as to where that line should be located, but in the absence of the maps referred to in the evidence, it is impossible for us to understand the testimony

on this point, and as the evidence appears to be conflicting, we should not disturb the judgment on that ground.

The patent in general terms describes the land granted as bounded on the west by the Sacramento river. In making the survey the surveyor, as is usual in such cases, ran along the bank of the river a series of short lines, called in the briefs in this case "meander lines," thereby following as near as possible the general course of the river, and by proper setoffs enabling the surveyor to compute the area included in the tract thus bounded by the river. A portion of the land occupied by the defendants is between these meander lines and the river, and it is contended that such portions are not included within the land granted by the patent. The river was manifestly intended as the western boundary of the land described in the patent, and these short lines were run for the convenience of the surveyor, because it was impossible, or very inconvenient, to run any but straight lines. They were never intended to represent, except approximately, the boundary of the grant. It cannot be supposed that the government intended to reserve these small and useless parcels of land scattered along the banks of a navigable stream. Where there is no natural boundary, the line of the survey will determine the boundary, but where the call is for a navigable stream, the only necessity for a survey is for purposes of computation.

The tax deeds put in evidence by the defendants cannot avail them, for the reason that they were all for taxes levied upon the land while they were in possession and while, therefore, it was their duty to pay the tax.

The order denying the motion for a new trial and the judgment are affirmed.

We concur: Sprague, J.; Wallace, J.; Rhodes, C. J.; Crockett, J.

JAMES B. LARUE, Respondent, v. FRANK CHASE, Appellant.

No. 2085; July 21, 1870.

**Spanish Grant.—One Claiming Title Under a Spanish Grant, who** would avail himself of the proviso giving him five years after confirmation by the United States in which to bring suit, must both allege and prove the facts which bring him within the terms of the proviso.

**Adverse Possession.—To Constitute a Bar to the Recovery on** the legal title, adverse possession must be open, notorious and exclusive, and adverse not only to the plaintiff but to every person holding or claiming title.

**Trust.—Under a Deed of Trust to Secure a Note to a Third Person,** not yet due, the legal title to the land concerned is in the trustee.

**Appeal—Time for Taking.—An Appeal Taken from a Judgment** after one year from its rendition cannot be entertained.

**Appeal.—A Question Raised as to the Judgment Being Inconsistent** with the findings cannot be entertained by the supreme court except on appeal from the judgment.

APPEAL from Third Judicial District, Alameda County.

A. M. Crane for respondent; W. H. Glascock for appellant.

RHODES, C. J.—The preliminary objections of the plaintiff to the transcript, not having been taken according to rule 12 of this court, are deemed waived.

The defendants pleaded the statute of limitations, and the plaintiff replied that he claimed title under a grant made by the Spanish and Mexican government, and that the grant was finally confirmed by the government of the United States within five years before the commencement of the action. The question presented is, Upon whom is the burden of proof as to the time of the final confirmation? It was decided in Richardson v. Williamson, 24 Cal. 297, and we think correctly, that the party who claims the benefit of the proviso, giving him five years after final confirmation of his title, within which to bring his action, must both allege and prove the facts which bring him within its terms. When the statute interposes a denial to the answer, the plaintiff need not aver those facts, but he must prove them. The plaintiff failed to make

this proof; but the failure in this respect was productive of no injury to the defendants, for the court has not found the requisite adverse possession in the defendants, to put the plaintiff upon proof, either of the final confirmation or of the pendency of proceedings therefor. To constitute a bar to the recovery on the legal title, the adverse possession must be open, notorious and exclusive, and adverse, not only to the plaintiff, but to every person holding or claiming title.

The defendants rely upon a deed of trust to defeat the recovery as to a part of the premises in controversy. The deed was executed by the plaintiff to trustees to secure the payment of his promissory note to a third party. The court found that before the commencement of the suit the plaintiff had conveyed the premises mentioned in the deed of trust to the trustees therein named "in trust to secure a debt which is not yet due." This finding, if we do not mistake its meaning, leaves the legal title to those premises in the trustees. Had there been a valid appeal from the judgment, it might be difficult for the plaintiff to meet this point. The appeal is taken from the judgment entered on the sixteenth day of September, 1867, and from the order made on the twenty-seventh day of April, 1869, denying the defendant's motion for a new trial. The notice of appeal was filed and served May 10, 1869. The appeal from the judgment, not having been taken within one year from its rendition, cannot be entertained. Errors which are disclosed by the judgment-roll cannot be connected on a motion for a new trial. The grounds relied upon on the motion for a new trial are insufficiency of the evidence to justify the findings, and errors in law occurring at the trial. The alleged error is not embraced within either of these grounds—nor, indeed, within any of the statutory grounds for a new trial, had the defendants relied on all of them—for the evidence showing the transfer of the legal title to the trustees was admitted without objection, and the court finds such transfer as a fact. The error consists in the rendition of the judgment for the plaintiff for all the premises, while the findings show, as the defendants claim, that the title to a part of the premises was, at the commencement of the action, in the trustees named in the deed of trust. In other words, the defendant's position is, that the judgment is inconsistent with the findings. This question arises upon the judgment-roll,

and cannot be entertained by this court, except on appeal from the judgment.

The defendant's objection to the recovery of land occupied or laid off for streets cannot be heard, for the reasons stated in answer to the last point. And the same disposition must be made of the question in respect to the rents and profits of the premises.

The point in respect to the time of the taking of the appeal from the judgment was not taken by the plaintiff, and would not have been noticed by the court, had it not involved a question of jurisdiction.

Appeal from the judgment dismissed, and order denying new trial affirmed.

I concur: Sprague, J.

We concur in the judgment and in the opinion, except as to the question of the effect upon the legal title of the conveyance in trust, upon which last point we express no opinion.

Wallace, J.
Temple, J.

Mr. Justice Crockett, being disqualified, did not participate in the decision.

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A. HIMMELMANN, Respondent, v. A. W. REAY et al., Appellants.

No. 1666; July 22, 1870.

**Street Assessment—Unknown Owners—Demand.**—Under the street law for San Francisco (Statutes of 1863, section 11, pages 529 and 530), when the lots upon which it is sought to establish a lien were assessed to unknown owners, the only demand necessary to be made, under the warrant of assessment, is a public demand on the premises assessed.

**Street Assessment.—The Dollar Mark Placed Before the Amount** in the footing of the assessment-roll sufficiently indicates the character of the figures of the several sums in the column above, if those sums appear with no such mark preceding them.

**Street Assessment.—In an Action to Enforce a Street Assessment** evidence in support of an averment of the answer that the

owners of the major part of the frontage duly undertook to do the work at the contract price but were prevented by the superintendent, is material and should be admitted.

APPEAL from Twelfth Judicial District, San Francisco County.

O. L. Lane for respondent; E. A. Lawrence for appellants.

See Himmelmann v. Reay, ante, p. 505; Himmelmann v. Reay, 38 Cal. 163.

TEMPLE, J.—Action for street assessment. The lots upon which it is sought to establish a lien by this action were assessed to unknown owners. In such cases the only demand necessary to be made under the warrant of assessment is a public demand on the premises assessed, and the return to the warrant shows that such demand was made in this case: Stats. 1863, p. 529, sec. 11.

The dollar mark is placed before the amount in the footing of the assessment-roll, and this sufficiently indicates the character of the figures, the amount of which is there stated.

The answer avers that the owners of the major part of the frontage of the lots of land liable to be assessed under the contract of the plaintiff, within five days after the publication of the award to plaintiff's assignor entered into a contract to do the whole of the said work at the price at which it had been awarded, and avers the execution of a written contract and a bond, as required by law, and that they commenced work and prosecuted the same with due diligence, until they were prevented by the superintendent and the plaintiff's assignor. On the trial evidence was introduced tending to establish these facts. After several witnesses had been examined, a motion was made to strike out their testimony; the ground of the motion is not stated in the transcript, and as there is no appearance on the part of the plaintiff in this court we are left in the dark as to the ground upon which this testimony was objected to. Evidence on the same points was introduced on the part of the plaintiff, and it seems to us a material question in the case; and its exclusion was error.

Judgment reversed and cause remanded for a new trial.

We concur: Sprague, J.; Wallace, J.; Rhodes, C. J.; Crockett, J.

## ALEXANDER B. GROGAN, Petitioner, v. COUNTY COURT OF SAN FRANCISCO.

No. 2123; July 22, 1870.

**Certiorari—Scope of Writ.—When by the Constitutional Amendment** of 1863 the power to issue a certiorari was secured to the supreme court, the writ was not purely the common-law writ of that name, but the statutory writ here when the amendment passed or as it might be thereafter through statutory regulation.

**Certiorari—Scope of Writ.—By Its Enactments in Respect** of the writ of certiorari, the legislature intended to permit this summary remedy for a usurpation of jurisdiction only in cases where there is no appeal allowed by law, whereby the error of the inferior court, officer or tribunal may be corrected, and where there is no other plain, speedy and adequate remedy.

**Extension of Streets.—Any Person Aggrieved by the Report of the Commissioners** appointed by the county court under the act of 1864, authorizing the board of supervisors to extend streets, might appeal to the supreme court; and the court thus appealed to might then review the report, or the proceedings of the commissioners or of the court, or any or all of them, upon matters of law, or confirm, correct, modify or set aside the report.

**Widening Streets in San Francisco.—In the Act (Stats. 1867–68,** 555) repealing the act of 1864, the proviso that nothing therein should affect "any proceedings taken, or to be taken, to widen Kearny and Third streets or to the extension of Montgomery street," etc., included the whole proceeding relating to the extension of Montgomery and Connecticut streets, which was but one proceeding; and it is not to be presumed that the legislature intended to preserve a part of the proceeding and to defeat the remainder.

Certiorari, San Francisco County.

Doyle & Barber for petitioner.

CROCKETT, J.—This is a proceeding by certiorari to review the action of the county court in proceedings pending before it for the extension of Montgomery and Connecticut streets, in the city of San Francisco, under an act passed in 1864, authorizing the board of supervisors to extend streets: Stats. 1863–64, 347. At the time when the writ of certiorari issued from this court the proceedings in the county court

were in fieri; the court having proceeded no further than the appointment of commissioners to assess the damages and apportion them on the property to be benefited by the improvement. But the commissioners had not made their report, and it is claimed on behalf of the relator that the county court never acquired jurisdiction of the proceeding, and that it exceeded its jurisdiction in undertaking to appoint commissioners. It is this alleged excess of jurisdiction which is sought to be corrected in this proceeding.

In reply, the respondents claim that the writ of certiorari cannot properly issue in such a case, because, as they allege, section 456 of the Practice Act defines the only cases in which the writ can issue, to wit, where the inferior court, board or officer has exceeded its or his jurisdiction, "and there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy"; and it is insisted that the act under which the proceedings were instituted expressly provides for an appeal, in which the whole action of the county court, including the appointment of commissioners, can be reviewed and set aside, if in any respect erroneous or even void for want of jurisdiction. On the other hand, the counsel for relator claims that the constitution confers on this court the power to issue writs of certiorari; that the necessary inference is that it was to be the writ as known at common law, and the legislature has not the power to restrict or trammel us in the exercise of a jurisdiction conferred by the constitution; that at common law the writ could issue to correct a usurpation of jurisdiction by inferior courts at any stage of the proceedings, and even though an appeal would lie from the final judgment, and that this court can issue the writ in like cases even though the statute attempted to prohibit it; but that in fact no appeal lies from the action of the court in the appointment of commissioners, but only for errors in the report and the proceedings subsequent to the appointment of commissioners.

He further claims that the act of 1864, under which the proceedings were commenced, has been wholly repealed by a subsequent statute (Stats. 1867–68, 555), and that though there is a proviso in the repealing act which might preserve from its operation the proceeding to extend Montgomery street, the proviso does not include the proceeding to extend

Connecticut street; and inasmuch as the two proceedings are so blended together that they cannot be separated, the proviso is inoperative for any purpose.

By an order of the court the argument of counsel has been confined, for the present, to these preliminary questions, which we now proceed to discuss.

At the first session of the legislature in this state this court was authorized by statute to issue writs of certiorari, and at the next succeeding session the writ was regulated by law and the cases prescribed in which it might issue. Section 456 of the code was then adopted, which defines in what cases the writ may issue and in what manner it shall be served. From that date to this the writ as regulated by statute has been in common use in this state. But by an amendment to the constitution, made in 1863, the right to issue the writ was for the first time secured to this court by a constitutional provision. The writ, as regulated by the statute, had then been in use for more than twelve years and had become familiar to the public and the profession. When the power to issue it was secured to this court by the constitutional amendment of 1863, the writ of certiorari which we were thereby empowered to issue was not purely the writ of that name as known at common law, but the writ as then in use in this state, and as the same then was or might thereafter be regulated by statute. The amendment to the constitution was not intended to define the character of the writ as known at common law, but only to secure to this court the right to issue the statutory writ of that name. The powers, therefore, which we can exercise under this writ are those prescribed by the statute so long as there is a statute in force defining in what cases and under what circumstances the writ shall issue. If there were no statute of that kind in force, we doubtless could issue the writ by virtue of the power conferred upon us by the constitution in such cases as we might deem it appropriate to issue it. But it will be time enough to deal with that question when it arises.

There is much force in the argument of relator's counsel to the effect that it would be the wiser rule to restrain a usurpation of jurisdiction at its first incipient step in the progress of a cause, and thus avoid the expense and delay of the subsequent proceedings, rather than to await the final

judgment and by appeal correct the error. We do not deem it necessary to inquire whether or not this was the rule at common law, nor whether it be the better and wiser rule, inasmuch as the statute provides that a writ of certiorari shall issue only when "there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." The counsel insists that this limitation in the statute was intended to prohibit the writ only when there is an appeal directly from the order or proceeding complained of; and that unless there be such appeal, the writ will lie, even though there may be an appeal from the final judgment on which the question of usurpation of jurisdiction might be reviewed and the proper remedy applied. But we think this is not the proper construction of the statute. The intention of the legislature was to permit this summary remedy for a usurpation of jurisdiction only in cases where there is no appeal allowed by law, whereby the error of the inferior court, officer or tribunal in that behalf may be corrected and where there is no other plain, speedy and adequate remedy. As we interpret the statute, it was not intended to permit a writ of certiorari to issue in any case wherein an appeal can be prosecuted, on the hearing of which the excess of jurisdiction may be corrected. There are doubtless many cases in which it would be better to permit the question of jurisdiction to be settled in advance of the subsequent proceedings. This case, perhaps, presents a striking illustration of the propriety of this course; and it is unfortunate for all the parties in interest that the question of jurisdiction cannot be now finally decided before the expensive and necessarily tardy proceedings which are to occur will authorize an appeal. But the fault, if there be any, is in the statute, and the courts are powerless to remedy it.

The next point to be considered is, whether or not on an appeal from the final judgment in this case this court could review and set aside, if erroneous, the action of the county court in the appointment of commissioners. The act not only authorizes any person who is aggrieved by the report of the commissioners to appeal to this court, but it empowers us on the appeal to review the report or the proceedings of the commissioners or the court, or any or all of them, upon matters of law, and to confirm, correct, modify or set aside the

report. The power appears to be ample to correct all errors from the first incipient step in the county court down to and including the report and its confirmation. If the court exceeded its authority in the appointment of commissioners, or committed any other error of law from the time it first assumed jurisdiction over the proceeding, we entertain no doubt whatever that the error can be corrected on appeal.

The only remaining point is, whether or not this right of appeal has been abrogated by the repealing act. It is conceded that the pending proceeding for the extension of Montgomery street was reserved in express terms from the operation of the repealing act. But there was blended with the proceeding for extending Montgomery street a proceeding also for extending Connecticut street. It was, in fact, but one proceeding, by which Montgomery street was to be extended southerly and Connecticut street northerly in the same line until the two streets met, so that thereafter they would form one continuous street.

The provision in the repealing act is as follows: "Provided nothing herein contained shall affect any proceedings taken, or to be taken, to widen Kearny and Third streets, or to the extension of Montgomery street, or to the extension of Second street through to Montgomery street in the city and county of San Francisco; but such proceedings may be continued, perfected and concluded, in all respects, the same as if said act was in full force and effect."

We think the proviso included the whole proceeding relating to the extension of Montgomery and Connecticut streets, which was in fact but one proceeding, and it is not to be supposed that the legislature intended to preserve a part of the proceeding and to defeat the remainder.

On the whole, our conclusion is that this is not a proper case for certiorari, and the writ is therefore dismissed.

We concur: Rhodes, C. J.; Wallace, J.; Temple, J.

CHARLES LUX, Appellant, v. HENRY H. HAIGHT, Respondent.

No. 2206; July 28, 1870.

**Land Patent—Mandamus to Governor to Issue.**—A petition for a peremptory mandate requiring the governor to issue a patent for lands, confirmed to the state by the United States, must allege as fact that the governor has found all the statutory prerequisites for his authority to issue the patent.

**Land Patent.—Before the Governor may Issue a Patent** for lands of the state, received from and confirmed by the United States, he must proceed to determine whether the land designated in the certificate of purchase from the register of the state land office, or a part of that land, belongs to the state and has been so confirmed to it, and whether the whole purchase money with interest thereon, as mentioned in the certificate, has been paid.

Mandamus, San Francisco County.

Wm. M. Pierson for appellant; Jo. Hamilton for respondent.

SPRAGUE, J.—By the statute under which petitioner claims his patent at the hands of the governor, the first affirmative act required of the governor, on presentation to him of a certificate of purchase from the register of the state land office, is to proceed and determine whether "the land or part of the land designated in said certificate belongs or has been confirmed to the state and the whole amount of purchase money, together with interest, thereon has been paid," and if he shall find as to these facts in the affirmative, then he is required to issue a patent for said land: Stats. 1858, p. 200, sec. 7.

This application is for a peremptory mandate to the governor to issue a patent to the petitioner, and his petition does not allege that the governor has found these prerequisite facts necessary to authorize him to issue a patent under the law. It is not alleged that the governor refuses to act in the matter of determining these prerequisite facts, nor is a mandate sought for the purpose of compelling him to act in the matter of determining them, but to compel the governor to perform

a final act, which the law only authorizes to be performed by him, after he shall have found and determined the existence of certain prerequisite facts.

Although the petition alleges the existence of these prerequisite facts, it does not allege that the governor had found or been satisfied of their existence at the time he refused to issue the patent.

The law devolves upon the governor the duty of finding and determining these facts, before he is required or permitted to perform the final act of issuing the patent, or, in other words, leaves the performance or refusal of this final act dependent on the discretion of the governor, as to the existence of prerequisite facts; and when this discretion does not appear to have been exercised, and the facts found by him to exist, a mandate cannot be issued to compel the performance of the final act.

Demurrer sustained.

We concur: Crockett, J.; Wallace, J.; Rhodes, C. J.; Temple, J.

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## DONNER v. PALMER et al. (BRADLEY, Intervener).

No. 751; July 29, 1870.

**Intervention—Ejectment.—One Should not Intervene, in a Suit** for land, whose claim rests upon a transaction in no wise connected with issues in the suit and cannot possibly be concluded by any judgment therein.

**A Stipulation Agreeing to Proposed Evidence and Expressly "Permitting"** either party to "add to it" such documentary evidence "as he may see proper" must be construed to mean, as to this added evidence, documents pertinent to the case and existing when the stipulation was made.

**Stipulation to Dispense With Further Pleading.—If, After an Intervener** files his petition, all the parties plaintiff and defendant stipulate with him to the dispensing with further pleadings, as if those already in met formally all questions on all sides, it cannot be objected to a judgment in his favor that it was not supported by his petition.

**Stipulation—Rival Claims Founded on Execution Sales.**—When a controversy was as to which is superior, between rival claims founded on sales in execution of different judgments against the one

**debtor, and by stipulation this naked controversy has been submitted to the court for its decision, after judgment the unsuccessful party cannot be heard to question the debtor's title to the property sold.**

WALLACE, J.—Donner, in April, 1861, commenced an action against the defendants to recover three undivided fourths of 100 vara lot No. 39 in San Francisco. He averred in his complaint that he was seised of the premises as owner in fee. The answers of the defendants denied that allegation, and set up title in themselves to the several subdivisions of which they admitted themselves in the possession.

The only issue, therefore, joined between those parties rested upon the ownership in fee of the undivided three-quarters of the premises. Under these circumstances Bradley undertook to intervene in the action. His petition, filed for that purpose (and served upon Donner and the defendants), set up that he was himself the owner in fee of one of the undivided three quarters of the premises mentioned in the complaint of Donner, and that he had an interest to that extent in the matter in litigation, in the success of Donner, and against the asserted title of the defendants. To this intervention Spencer, one of the defendants, filed an answer, which only raised an issue of title between himself and Bradley. The other defendants did not, in fact, plead to the petition of Bradley, but by stipulation of parties the answers already on file to the complaint of Donner, and the replication of the latter thereto, were adopted as the pleadings in the intervention, and on the 18th of January, 1862, a stipulation was entered into between Donner and Bradley, by the terms of which the former was "considered as having duly filed his answer to the intervention or complaint of Bradley," etc., and the latter "considered as having duly filed his replication to such answer," etc.

The pleadings upon which the asserted right of Bradley in the premises was to be tried and determined in the action of Donner v. Palmer et al. were thus made up and became part of that cause by consent of all parties concerned, none of whom seem to have made any question touching the practice or the mere form of procedure pursued by Bradley, nor to have regarded the latter as seeking to intrude himself into a pending controversy of theirs, in which he had no legal right to be heard. And at this point we may remark that the con-

troversy thus initiated by the petition of Bradley, while it nominally involved the defendants, really concerned Donner only, for, while it sought to deprive the latter of an undivided one-quarter, being one-third of the interest he claimed, it had no material bearing upon the position of the defendants, whose hope of success in the action lay in the defeat of the alcalde grant itself, under which both Donner and Bradley claimed undivided interests, and failing in this, it would be of no appreciable difference to them, whether they should surrender the premises to Donner alone, or to Donner and Bradley together—no question of rents and profits or damages being involved.

On January 31, 1862, Donner and Bradley signed and filed another stipulation, evidently prepared with great care, and covering some half dozen printed pages in the transcript, which sets forth the facts, upon which they respectively claim the one-quarter of the premises mentioned in Bradley's petition, and conclude with a clause that these stipulated facts "shall be deemed and held to be admitted and proved on the trial of said cause, with the same force and effect in all respects whatever, as though such facts were put in issue by the pleadings in the cause, and duly established by competent proof thereof." It appears by this stipulation that the particular quarter brought in controversy between Donner and Bradley was one which is conceded to have once belonged to Yontz (by a deed of Donner made to him), and that Donner and Bradley each claim to have afterward acquired the title of Yontz through the operation of certain attachments, judgment liens, execution sales, sheriff's deeds, etc. The question made involves the relative priority of the lien of the one over that of the other. The evident object of this stipulation is, that the claim of Bradley, as made before the court, should be determined upon the legal effect of the stipulated facts themselves. It looked to a final judgment upon the very right of the parties as thus set forth—regardless of the mere form in which the claim itself was presented. This is plain enough from the nature of the stipulated facts themselves, but in order that no misapprehension in this respect should occur, the stipulation declares in terms that "it is further agreed and expressly understood that it is the intention and object

of the foregoing stipulation to submit to the court as a question of law the question of the priority of the foregoing judgments, liens and attachments, and which of the parties acquired under the sales herein mentioned the interest of the said John Yontz in the property sold, as hereinbefore stated, and that either party may give in evidence any documentary evidence they may see proper."

The first trial of the cause was held in 1862 before the court below and a jury, and on that trial all the issues, as well those between Donner and Bradley themselves as those in which the defendants had an interest, were tried and determined. The result was, that under the instructions of the court the jury found a general verdict in favor of Donner against the defendants, and the intervener as well. The court below denied the defendants a new trial, and they came here on appeal from the order of denial. But the court below, at the same time, granted the intervener a new trial, and this order Donner brought here for review.

These two appeals, though separately presented, arose in the same action, and were consolidated and considered together in this court: Donner v. Palmer, 23 Cal. 40. This court then reversed the order denying a new trial to the defendants, and affirmed the order granting a new trial to the intervener—the result was, that the cause was remanded, in order that this general new trial should be had. It was had accordingly, and the jury again found a verdict in favor of Donner as against the defendants, upon which verdict judgment was entered in his favor, which judgment has since been affirmed in this court: Donner v. Palmer, 31 Cal. 500. Upon this new trial the case as between Donner and Bradley, the intervener, was by further stipulation withdrawn from the consideration of the jury, and submitted to the judgment of the court. The stipulated facts were brought to the attention of the court below and the case made by the intervener was substantially the same which had been presented here on the first appeal in 1863. Donner, however, put in certain documentary evidence which did not appear in the case on its first trial (and indeed could not have so appeared, for a portion of it had no existence then). The court below, in deciding the case between Donner and Bradley seems to have given no consideration whatever to this documentary evidence put in by Donner

on the second trial, and so far, we think, the court was right; though it would have been better to have excluded it altogether, upon the objection of Bradley. The stipulation permitting either party to add to it such "documentary evidence" as he saw proper must be construed to mean that such "documentary evidence" was pertinent to the issue made—which the evidence put in by Donner was not, for it seems to have had no concern with the Yontz quarter in controversy. And the stipulation must also be construed to mean such "documentary evidence" as was in existence at the date of the stipulation itself, and which might, if the parties had chosen to do so, have been added or annexed to the stipulation itself at the time. The clause of the stipulation giving leave to either party to produce other "documentary evidence" must be considered to have reference to "documentary evidence" then in existence, and of which they knew or must be held to know, but they could not have known, nor reasonably be held to know, of the existence of a document, which did not, at the date of the stipulation, exist at all—and, in fact, had no existence even so late as the first trial of the cause in the court below. We allude, of course, to the deed of James Ross, made to Donner on the third day of March, 1862.

The court below, however, though disregarding the evidence offered by Donner, rendered judgment against Bradley, because "no case was made by the intervener in his petition, or in the facts offered or received in proof, to entitle him to a judgment, either against the defendants or the plaintiff." From this judgment, and an order subsequently made refusing him a new trial, Bradley has brought this appeal; and the parties have stipulated that the transcript on file here in the late case of Donner v. Palmer et al., 31 Cal. 500, shall be considered in connection with the statement filed by the intervener on the appeal, so far as the same is applicable.

In connection with the order denying the intervener a new trial, the court below filed an elaborate opinion, which appears in the record and which we have attentively considered. In proceeding to determine the case against the intervener by reason of the supposed insufficiency of his petition of intervention, or of the stipulated facts to entitle him to judgment in his favor, the court below assumes "that nothing was decided in the case in the supreme court affecting either the

plaintiff or defendants and the intervener, except the question as to which of the judgments had the prior lien on Yontz' interest at a given date in the demanded premises." "Everything, therefore," says the court, "beyond that remained open to inquiry and determination in this court on the new trial." Upon this view the court below felt at liberty to consider the sufficiency of the petition of Bradley as a question properly before it, and thereupon it determined that that petition would not support a judgment in his favor.

It may be conceded to be abstractly true that this court, on the former appeal in 1863, did not determine that the petition of Bradley did support his intervention in the cause. No such objection was raised then, and we think that no such objection would have been entertained here, if it had been then attempted. For we think that the intention of the parties, in making the stipulation of January 31st, and its effect as made, must be held to preclude Donner on the former and present appeal, and should have precluded him in the court below from raising or relying upon this objection. By that stipulation he and Bradley had for themselves determined and adjusted between themselves all questions, except that one ultimate question by the stipulation reserved for the determination of the court. It became wholly immaterial, in view of the stipulation, whether Bradley had presented a sufficient or any petition at all; for the stipulation undertook to supply him with all the necessary pleadings on his part, to enable him to obtain the judgment of the court upon the facts of his case, which facts were, at the same time, admitted. And Donner, who had never, in fact, pleaded at all to the petition of Bradley, by means of the stipulation, was considered as having done so, and to have placed upon the record all the averments and denials proper to enable him to present his case against Bradley for determination by the court. We think that Donner was not at liberty thereafter to assume the position that the case itself was not one in which an intervention could be properly made, or that the pleadings of Bradley were insufficient for that purpose. For the effect of that objection, were he permitted to rely upon it, would be to withdraw the stipulation itself, as was, in fact, thereby done below, from the consideration of the court. How can the court decide "as a question of law the question of priority . . . . and which

of the parties . . . . acquired . . . . the interest of said John Yontz," etc., which was expressly declared to be submitted for decision, if Donner is to be permitted to say that Bradley is not entitled to be heard at all? For upward of three years the parties had proceeded in the cause upon this construction of the stipulation, and the question expressly reserved had been tried in the court below, a new trial granted, considered here upon appeal brought by Donner himself to get rid of the new trial, and throughout all these various proceedings no question is made that Bradley is properly a party in the cause, and with a case properly presented for a judgment on the merits.

We are of opinion that the court below erred in entertaining the objection to the sufficiency of the petition, and in disposing of the cause on that ground, and that the judgment must be reversed for that reason.

We think, too, that upon the return of the cause a judgment should be entered by the court below, determining that Bradley is the owner of an undivided one-fourth interest in this lot 39.

The case stands wholly upon the stipulated facts. Those facts, as we have seen, were before the court on the former appeal, and it was then adjudged here that the intervener had the better right. It would have been proper, then, to have directed a final judgment for Bradley, had it not been that the order for the new trial awarded to the defendants left the title of both Donner and Bradley undetermined, as against the defendants, who might, upon the new trial, succeed in overthrowing the alcalde grant itself, and thereby put an end to the existing controversy between Donner and Bradley. The intervention was, therefore, remanded for a new trial, but this court, at the same time, decided that upon the facts then before it Bradley was the owner in fee of the undivided quarter of this lot 39.

That decision became the law of the case, and thereafter conclusive alike upon the parties, the court below and this court, so long as the facts remained substantially unchanged, and we have seen that on the second trial of the cause they were substantially the same as they appeared on the last appeal.

It is now urged, however, by the counsel of Donner, that the ultimate question of title as between Donner and Bradley was never submitted for decision at all; that even though it has been determined that, upon the agreed facts, such title as Yontz had was vested in Bradley, it may be that Yontz never had a title. We do not so construe the stipulation. It assumes as a basis that Yontz had the true title to this quarter at a given period of time, and then the judicial proceedings against Yontz are set forth, under which Donner and Bradley respectively claim to have acquired that title, the question being, as we have said, one of priority of lien merely. If Yontz had no title, Donner should not have made the stipulation he did, for it amounted to an imposition on the court, which he ought not now to be heard to avow as a means of escaping from the consequences of the decision made. The stipulation distinctly looked to the rendition of a final judgment, which should determine that Donner or Bradley, the one or the other, had acquired the title in fee to the undivided quarter assumed and admitted to have been formerly vested in Yontz. We cannot regard it as reserving the question as to whether or not Yontz himself ever had the title, or as merely presenting the abstract question of the relative priority of the lien, under which each claimed to have acquired that title for himself. It cannot be considered that it was the purpose of the parties to obtain the opinion of the court upon one abstract proposition in the first instance, and then upon another, and so on ad infinitum, as they may see proper to submit them, and to be followed, it may be, by no determination of the ultimate rights of either party. Our judicial system has not, as yet, provided for the establishment of moot courts, or made it our duty to solve legal conundrums for purposes of mere amusement or instruction.

The judgment and order denying a new trial are reversed, and the cause remanded with directions to the district court to render judgment that Bradley is the owner in fee of an undivided fourth of the premises, and awarding him the possession thereof, with costs against the plaintiff.

We concur: Crockett, J.; Sprague, J.

I dissent: Rhodes, C. J.

PEOPLE, Respondent, v. MARIPOSA COMPANY, Appellant.

No. 2127; August 2, 1870.

**Taxation—Default Judgment.—In an Action for the Recovery of taxes,** where the summons does not contain the notice that "the plaintiff will apply to the court for the relief demanded" in the complaint, a judgment by default must be reversed.

APPEAL from Thirteenth Judicial District, Mariposa County.

J. B. Campbell for respondent; J. B. Felton & A. Deering for appellant.

See People v. Mariposa Co., 39 Cal. 683.

RHODES, C. J.—This is an action for the recovery of taxes assessed on the Mariposa estate for the year 1866. It is objected by the defendants that the proper notice was not inserted in the summons in accordance with section 26 of the Code; and we are of the opinion that the objection must prevail. The action is for the recovery of the taxes and for the enforcement of a lien upon the real estate for their payment. The case, therefore, comes within the second subdivision of section 26, and the summons should have contained the notice that "the plaintiff will apply to the court for the relief demanded therein" (in the complaint). A judgment by default rendered upon the service of summons which does not contain the notice prescribed by that section is erroneous.

Judgment reversed and cause remanded.

We concur: Wallace, J.; Sprague, J.; Temple, J.

S. H. BROWN, Respondent, v. JOHN PFORR, Appellant.

No. 2342; August 2, 1870.

**Brokers—Right to Commission.—On Appeal from a Judgment** in favor of a broker for commissions for selling the defendant's real estate, the question of an alleged revocation before the sale of the plaintiff's authority to sell will be left as found by the trial court, if the evidence was conflicting.

**Trial.—An Instruction on a Point not Raised by the Pleadings** and as to which no evidence has been put in should be refused, even though good law in the abstract.

APPEAL from Fourth Judicial District, San Francisco County.

Grey & Brandon for respondent; George & Loughborough for appellant.

See Brown v. Pforr, 38 Cal. 550.

TEMPLE, J.—This action was brought for commission alleged to be due the plaintiffs, who were real estate brokers, for selling a lot in the city of San Francisco as the agents of defendant.

Upon the question as to whether the defendant revoked the authority to sell before the sale was actually made the evidence is clearly conflicting.

The instruction asked for by the defendant, and which the court refused to give, is undoubtedly correct as a proposition of law. It was the duty of the plaintiffs to get the best price they could for the property, notwithstanding they were authorized to sell at a fixed sum, which was mentioned as the lowest price which would be accepted, and a double employment, both for buyer and seller, would be inconsistent with their duty to each; and if the fact were unknown to the parties, it would be a fraud upon each. Unfortunately for the defendant, however, no such issue is tendered by the pleadings, nor is there any evidence to which such instruction would be applicable. The statement of the plaintiff Brown that they had a customer who desired property in that locality does not even tend to establish the fact of an employment to

purchase this property for such customer. The fact that brokers may know of persons who wish to purchase is one reason why it is considered advantageous to employ them to sell.

The instruction, therefore, was properly refused.

Judgment and order affirmed.

We concur: Crockett, J.; Wallace, J.; Rhodes, C. J.

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## JOHN BENSLEY, Respondent, v. JOHN B. LEWIS, Appellant.

No. 2419; August 5, 1870.

**New Trial—Time for Notice of Intention.**—It is required of one intending to move for a new trial that he give notice of that intention within ten days after the service upon him of notice of the decision of the court.

**Appeal.—A Mere Proposed Statement on Motion for a New Trial,** or a statement not first agreed upon by counsel or certified by the trial court, will not be considered on appeal from an order denying the motion.

APPEAL from Fourth Judicial District, San Francisco County.

J. McM. Shafter for respondent; M. G. Cobb for appellant.

WALLACE, J.—Final judgment was rendered in the court below on January 9, 1869. Notice of appeal therefrom was filed and served January 28, 1870. The appeal from the judgment was, therefore, too late to be entertained here against the objection of the respondent, which has been duly made.

The action was tried by the court below sitting without a jury. The decision of the court having been rendered in favor of Bensley January 9, 1869, and no findings being filed, notice of the rendering of the decision was given to the attorney of Lewis on January 22, 1869. It was his duty, if he intended to move for a new trial, to give notice of that intention within ten days thereafter. His time to give that notice expired

on February 1, 1869. He gave the notice, however, on the 2d of February, 1869, which was precisely too late.

He filed a proposed statement in support of the motion for a new trial on February 6, 1869. The statement was neither agreed to by the respondent's counsel nor certified by the judge. The motion for a new trial was denied by the court below, and, as we said in Cosgrove v. Johnson, 30 Cal. 510, "he may well have denied the motion for the reason that there was no settled statement, and, for aught we know, may have done so." It is at all events settled in this court that a mere proposed statement on motion for a new trial, or one which has not been agreed to by counsel nor certified by the judge of the court below, will not be considered here upon appeal from the order denying the motion.

The appeal from the judgment must, therefore, be dismissed and the order denying the new trial affirmed.

And it is so ordered.

We concur: Crockett, J.; Sprague, J.; Rhodes, C. J.; Temple, J.

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GEO. W. TYLER, Respondent, v. CHAS. A. GRANGER, Appellant.

No. 2280; August 5, 1870.

**Trust Deed—Redemption.—In a Suit by the Grantee Named in a Deed of Trust to Recover** the possession of the granted premises from purchasers under an execution, in which suit the defendants have answered by a cross-bill construable as an offer to redeem, if the court, by its findings and conclusions and its referring the matter to a court commissioner to be reported upon, has virtually sustained the answer, there should be, after the commissioner's having reported, a decree that the defendants pay or tender to the plaintiff within a reasonable fixed time the amount found to be due him, naming it, together with the costs of the suit, and that the plaintiff, upon receipt of this, execute and deliver a good and sufficient deed to the defendants, but that in default of so paying or tendering these be debarred from all further claim or right to redeem.

APPEAL from Fifth Judicial District, San Joaquin County.

Stayton conveyed to Tyler, January 7, 1863, in trust as set forth—so the deed recited—in a declaration of trust of the

same date from Tyler to Stayton. The deed was subject to a writ of attachment at the suit of one Frank Stewart in pursuance of which subsequently, on Stewart's action going to judgment, the land was sold by the sheriff to one Alvin Fisher, who, as alleged in the complaint in the present case, took for the benefit of himself and the defendants, to wit: Charles A. Granger, Samuel Fisher, Zenus Fisher, Archie Woodson and John Freeborn. By the terms of the declaration of trust Tyler, after the expiration of sixty days, was to sell the premises and out of the proceeds of sale pay off a note of Stayton and others, of whom Samuel Fisher was one, in favor of one William M. Ryer's order. As further alleged these defendants entered sometime before November 14, 1863, the day the plaintiff redeemed the premises from the sheriff's sale, thereby becoming entitled to the possession. The prayer was for a surrender of the possession accordingly and for the rents and profits, and for such other relief, etc. The answer set up the Stayton-Ryer note verbatim, which note was of the usual sort, and alleged that Samuel Fisher was then the owner and holder of it; it also alleged that the trust deed to Tyler composed with the declaration of trust a mortgage, in fact, to secure the payment of that note. It alleged that "the said G. W. Tyler" was "no longer the agent of the said William M. Ryer, the payee of said note, and had and has no right, power or authority from him to take any steps for the enforcing of the payment of said note or for the possession of the said land." It denied that Tyler had been given any power or authority from either Ryer or Stayton enabling him to redeem from the sale made by the sheriff as above, and on information and belief denied that he had so redeemed or was entitled to the possession. It admitted that Tyler had, to be sure, placed certain money "called greenbacks" with the said sheriff, but alleged that the sheriff still held that identical money and that it could be recovered by him on applying for it. The answer closed with a prayer that Tyler be decreed to convey the premises to the defendant Samuel Fisher on the payment to him of his reasonable costs. About everybody concerned in the transaction seems to have been brought into the action and to have pleaded. The findings made out the note to have been originally for the sum of four thousand six hundred dollars, of which sum one of the makers had

paid all but six hundred and eighty-nine dollars, that Stayton still owed, as maker and for contribution, three thousand and five dollars, and that the aim of the deed of trust was to pay this sum; that Tyler had found it impossible within the sixty days to find a purchaser who would pay as high as three thousand and five dollars for the land, and that Tyler had passed the note back to Ryer before the sheriff's sale had been had. Other facts in the case are sufficiently indicated in the decision.

G. W. Tyler for respondent; J. H. Budd, for appellant.

See Tyler v. Granger, 48 Cal. 259.

SPRAGUE, J.—The alleged errors presented in appellant's first six specifications, even if admitted to be well taken, resulted in no prejudice to appellants. The defendant's answer in the nature of a cross-bill to redeem the premises from the lien to which they were subject in the hands of the plaintiff as trustee, as between the parties to this appeal, seems to have been sustained by the findings of fact and conclusions of law filed by the court; and the order thereupon made, referring the case to the court commissioner to take testimony therein, from which to determine the amount to which plaintiff as trustee was entitled for costs, expenses and services rendered in and about the business of collecting payment of the debt, for which he held the title of the premises in trust as security, was made by consent of both plaintiff and defendant. On the coming in of the commissioner's report upon the matters referred, and a determination therefrom by the court of the amount so due and payable to plaintiff on redemption of the premises, as prayed for in appellant's cross-bill, it was irregular and improper for the court to render a money judgment against defendants and in favor of plaintiff, as the plaintiff was not entitled to such judgment, so long as he held the legal title to the estate, which defendants sought to redeem; and, further, the judgment does not grant the defendants the relief prayed for in the cross-complaint, nor the relief to which the previous finding of fact and conclusions of law, as filed by the court, show them entitled, nor, indeed, any relief whatever.

Upon the facts and conclusions of law, as first found by the court, and the subsequent finding upon the testimony reported

by the commissioner, of the amount properly due and payable to the plaintiff on release of the premises from the trust lien, the regular and proper decree would have been that defendant, Samuel Fisher, within a reasonable fixed time, pay to plaintiff the sum of four hundred and eighty dollars (the amount found to be due him for services, etc.), together with the costs of suit; and that the plaintiff, upon the receipt or tender to him of the amount so required to be paid by said defendant, Samuel Fisher, make, execute and deliver to said defendant, Fisher, a good and sufficient deed for the conveyance of the title held by him in trust of the premises described in the complaint; and that, on failure of said defendant to pay or tender such sums to plaintiff within the time prescribed, that defendant be barred of all further right or claim to redeem: Meyer v. Mowry, 34 Cal. 517; Cowing v. Rogers, 34 Cal. 652.

The judgment should be so modified. The cause is, therefore, remanded, and the court below is directed to enter a decree in accordance with this opinion.

We concur: Crockett, J.; Rhodes, C. J.; Temple, J.; Wallace, J.

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## J. H. BUDD, Appellant, v. MADISON J. DRAIS, Respondent.

No. 2279; October 11, 1870.

**New Trial—Reversal of Order for.**—When it does not appear that there was a motion made for the new trial ordered by the trial court, nor an agreed or settled statement on such motion nor any affidavits, the order is to be reversed.

APPEAL from Fifth Judicial District, San Joaquin County.

Byers & Elli[illegible] for appellant; G. T. Martin for respondent.

TEMPLE, J[illegible] The district court granted a new trial, but the record does not show that a motion for a new trial was

ever made, nor is there an agreed or settled statement on such motion, or any affidavits, as required by the Practice Act. The transcript contains what purports to be a statement on motion for a new trial, but it is neither settled nor agreed to, nor does it contain any specifications whatever of the grounds upon which the moving party relies. The statement should have been disregarded, for both reasons given.

The order granting a new trial is reversed, and cause remanded.

We concur: Rhodes, C. J.; Wallace, J.; Crockett, J.; Sprague, J.

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## C. ADOLPH LOW & CO., Respondent, v. ALEXANDER AUSTIN, Appellant.

No. 2369; October 12, 1870.

**Taxation.—Imported Goods Exposed for Sale in the Store of a merchant constitute a portion of the wealth of the state, for purposes of taxation, as much as do domestic goods similarly situated; and it is immaterial whether the importer is also the merchant who sells or whether the goods are in the original packages and at the time owned abroad.**

APPEAL from Fifteenth Judicial District, San Francisco County.

Hambleton & Gordon for respondent; H. H. Byrne for appellant.

TEMPLE, J.—The plaintiffs are importing, shipping and commission merchants at San Francisco, and in their capacity as commission merchants have in their hands for sale certain champagne wines in cases. The wines are the property of Gustave Gibert, of Rheims, in France, by whom they were consigned to the plaintiffs, and subject to whose orders they are held.

The goods had, just prior to their possession by plaintiffs, been imported by Gibert. The custom-house duties and charges having been paid, they were stored by plaintiffs in

their warehouse in the original packages in which they were imported, and while in that condition, being still unsold, were assessed by the assessor of the city and county of San Francisco for state and county taxes. Upon seizure of goods being made by the tax collector, to enforce the payment of these taxes, they paid under protest, and this suit is brought to recover the amount paid. The plaintiffs had judgment and defendant appeals. The tax was levied under the general revenue law of the state, and is an ad valorem tax upon all values in the state alike, and the only question presented is whether it is a tax upon imports within the meaning of the tenth section of the first article of the constitution of the United States, the material portion of which reads as follows: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the reversion and control of the Congress."

The case of Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678, is confidently relied upon by the respondent as having decided the question in his favor. In that case the court declared an act of the state of Maryland, requiring all persons who should sell imported goods by wholesale, bale or package, to take out a license from the state, for which they were required to pay fifty dollars, in conflict with the provisions of the constitution of the United States above quoted, and also to that which confers upon Congress the power to regulate commerce. It was held that the license was a tax upon the articles imported; that it intercepted the goods before they had become mingled with the mass of property of the state, and, therefore, it was a tax upon the goods as imports, and consequently within the constitutional inhibition.

It will be seen at a glance from a mere statement of the two cases that they do not rest upon the same principle. In this case no tax is levied upon imports, as such; they are not subjected to any burden as a class, and we do not understand the case of Brown v. Maryland as going to the extent of establishing that an ad valorem tax by the state upon the property of its citizens would be in conflict with this provision, even

though a portion of such values were invested in imported goods still in the original packages and unsold. This was the understanding of that case entertained by Chief Justice Taney, who argued the case for the state of Maryland. In the License Cases, 5 How. 575, speaking of this decision, he says: "I argued the case in behalf of the state, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the state, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the state more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the supreme court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand and of the states on the other, and preventing collision between them. . . . .

"Undoubtedly a state may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported while it remains a part of foreign commerce and is not introduced into the general mass of property in the state. Nor, indeed, can it even influence materially the price of the commodity to the consumer, since foreigners as well as citizens of other states, who are not chargeable with the tax may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition."

To the same effect is the language of Mr. Justice McLean in Nathan v. Louisiana, 8 How. (U. S.) 73, 12 L. Ed. 992:

"What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vender of these products exempted from state taxation because they may be thus used? Is a

tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a state? May it not tax the business of ship-building the same as the exercise of any other mechanical art? And also the traffic of ship-chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business within the state on the ground that the products sold may be used in commerce. No state can tax an export or an import as such except under the limitations of the constitution."

In the case of State v. North, 27 Mo. 464, the supreme court held an act, which imposed a discriminating tax upon imports, after they had been sold by the importer and after the packages in which they had been brought into the country and been broken was in conflict with this provision of the constitution.

The discussion in Brown v. Maryland evidently has reference to a tax upon imports as such, that is, upon articles which have been imported—as a distinctive class—and had no reference to such general property taxes as the state may impose upon all property within its borders, but discriminates neither in favor of nor against any. This is the view taken of that case by the supreme court of this state in Lin Sing v. Washburn, 20 Cal. 534. The question involved in that case was the right of the state to impose a license tax upon the Chinese. It was claimed that the tax was in conflict with that provision of the constitution which empowers Congress to regulate commerce and also with certain treaties and laws of Congress. Mr. Justice Cope, in the course of an able opinion, referring to the case of Brown v. Maryland, says: "It was admitted that when the article had lost its character as an import by being incorporated and mixed up with the mass of property in the country, it became subject, like other property, to the taxing power of the state. This admission, however, does not acknowledge the power of a state to single out an imported article and subject it to a tax not imposed upon other property of the same description; and such a tax would undoubtedly come within the principle of the decision. The whole reasoning of the decision shows that a discriminating tax, the effect of which would be to give preferences and close

the markets against imported articles, would be invalid, and it is impossible that any circumstance could give validity to it. The court did not intend to distinguish between wholesale and retail dealers, nor between the importer and other persons purchasing the articles for the purposes of traffic, but to lay down a rule covering the whole ground of state interference. The free use of the powers vested in the government was declared to be essential to its existence, and the intention was to lay down the rule broad enough to include every act of a state obstructing or impeding the constitutional measures of the government. A state may tax the property of its citizens, but it cannot tax imports; and a tax discriminating against an imported article would be a tax upon the article as an import and not as a part of the general mass of property."

In the case of Brown v. Maryland it was contended on the part of the state that goods retained their distinct character as imports only while in transitu and that after they were once landed they became incorporated with the mass of property constituting the wealth of the state, and were not imports within the meaning of the constitutional inhibition. It was held, however, that the right to import implied the right to sell, that being in general the reason for importing, and also that the power of the United States to regulate commerce does not terminate at the boundaries of a state. That a tax imposed upon imported goods, after they have been landed within the state, would tend as effectually to prevent or restrict importations as would one imposed before they are landed, and such tax would, therefore, as effectually tend to defeat the object of the prohibition.

The federal government having no powers except such as are granted to it by special enumeration, and the states retaining all not granted or prohibited, the presumption must be in favor of the validity of the state law, until it is shown to be in conflict with some provision of the constitution of the United States, or some law of Congress, or treaty made in pursuance of the powers granted.

It is admitted that the state may tax imported goods after they have become incorporated with the mass of the wealth of the state. It is contended that the property taxed in this case had not become incorporated with the mass of the gen-

eral wealth of the state, simply because it was still the property of the importer in the original packages in which it was imported.

We see nothing in this which even tends to show that the property had not become incorporated with the general wealth of the state. We see no reason why imported goods, exposed in the store of a merchant for sale, do not constitute a portion of the wealth of the state as much as do domestic goods similarly situated. Nor do we see the slightest difference whether the importer is also the merchant who sells, or whether the goods are in the original packages or not. In either case the goods are exposed for sale in the markets for the profit which may be realized from selling. They may be equally the basis of credit, and alike they require and receive the benefit of the police laws of the state, and upon every principle of equality should contribute to pay for their protection. Possibly the plaintiff, who is a commission merchant, has in his store champagne wines manufactured in Sonoma or Los Angeles, which he is offering to sell in the same market in precisely similar packages. In what possible sense can one be said to constitute a portion of the wealth of the state in which the other does not? The object of the constitutional restriction is said to be to prevent the state from imposing a tax upon commerce—to discriminate against foreign goods. It certainly cannot be intended to discriminate against domestic productions, by exempting foreign goods from its share of the cost of protecting it.

A tax, which is imposed alike upon all the property of the state, cannot, in any sense, be considered a tax upon commerce. It has no tendency to discourage importations. Exemption from the tax might encourage importations, but certainly it was not the purpose of the restriction to compel the state to offer a bounty to foreign producers over domestic. The tax prohibited must be a tax upon the character of the goods as importations rather than upon the goods themselves as property.

But it is not true that the right of the state to tax imports depends upon the question whether they are still in the original packages, in the hands of the importer or wholesale dealer, or not; nor even whether they have become thoroughly incorporated into the general mass of property or not. It is

said that a power which can impose a small tax may impose a large one, and, therefore, if there were no restriction, the state could, through its power of taxation, prevent importations altogether. If the test as to whether the goods are imports or not, within the meaning of the restriction, be whether they are still in the hands of the importer or a wholesale dealer, in the original packages, or not, then as soon as they have been sold or the packages broken it would follow that the state might impose any tax it might see fit. But a large tax upon the consumer of foreign goods would as effectually prevent importation as a tax upon the commodity in the hands of the importer. Many articles might not be taxed until after they had been in the hands of the consumer for years, as, for instance, railroad iron, and then be subject to so high a tax as effectually to prevent all importations. There can be no doubt that such a tax would be declared void, otherwise the restriction can serve no purpose whatsoever. Any tax upon imported goods as a class, or which discriminates against them, is within inhibition. On the other hand, all the wealth of the state, whether it be in imported goods, in the hands of the importer, or in the original packages in which they were imported, or not, are subject to the general ad valorem tax, which is imposed alike upon all values within the state.

The judgment is reversed and cause remanded, with directions to enter final judgment for the defendant.

We concur: Wallace, J.; Crockett, J.; Sprague, J.

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PIERRE MERLE, Appellant, v. PATRICK MEAGHER, Respondent.

No. 2155; October 17, 1870.

**Deed—Time of Execution.—The Date Mentioned** in a deed as the date of its execution is only presumptively the true date, when there is no evidence that it was really executed at a different time.

**Deed—Date of Execution.—By Statute the Certificate of Acknowledgment** is prima facie evidence of the genuineness of the

deed, that is, that it had been executed at the time the certificate was made; as to what time that was, the date on the face of the certificate is itself prima facie evidence.

APPEAL from Fifteenth Judicial District, San Francisco County.

Edward Tompkins for appellant; Byrne & Freelon and R. F. Ryan for respondent.

TEMPLE, J.—Both parties claim title to the premises in controversy under Charles W. Stewart, who was the grantee of one Joseph Hobson—Hobson conveyed to Stewart by a deed, which purports to be executed on the 21st of July, A. D. 1851, and which was recorded on the 29th of the same month. It was acknowledged, however, on the 4th (fourth) day of July, A. D. 1851. The deed from Stewart, under which defendant derives title, bears date the 19th of July, 1851, and was acknowledged July 29th of the same year, and recorded the same day, while the deed from Stewart, under which the plaintiff claims, bears date in 1852. There was no evidence of the time either of the deeds were executed or delivered, save the presumptions arising from the above dates.

The deed from Stewart, under which the plaintiff claims, is a quitclaim deed, and, in case it should be held that the deed from Hobson had not been delivered prior to the time of its apparent execution, it will follow that Stewart had not title to convey at that time, and as the after-acquired title would not inure to the benefit of Stewart's grantee, the defendant has no title but the title passed to the plaintiff's grantor by the deed from Stewart in 1852.

It is claimed by the plaintiff that there being no allegation of proof to the contrary, the dates which the several deeds bear must be regarded as their true dates, and that the presumption is, that they were delivered at the time they were executed, and it consequently follows that Stewart had no title to convey at the time he executed the deed under which the defendants claim.

The date mentioned in a deed as the date of its execution is only presumptively the true date, when there is no evidence that it was really executed at a different time. The statute makes the certificate of acknowledgment prima facie evidence

of the genuineness of the deed—that is, that it had been executed at the time the certificate was made, and there can be no doubt that the date upon which the certificate purports to be made is prima facie the true date of the certificate. It is one of the very facts which the officer is required to certify. This is at least sufficient to overcome the presumption, raised by the date which the deed bears, that it was not executed until the 21st of July, and then the burden of proof falls upon the plaintiff.

Judgment and order affirmed.

We concur: Rhodes, C. J.; Crockett, J.; Sprague, J.; Wallace, J.

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ELI MAYO, Appellant, v. CITY OF SACRAMENTO, Respondent.

No. 1984; October 19, 1870.

**Judgment.—A Court has the Power to Amend the Judgment entered in order to make the latter conform to the order directing it to be entered, and conform to the findings.**

APPEAL from Sixth Judicial District, Sacramento County.

P. Dunlap for appellant; J. G. McCallum for respondent.

CROCKETT, J.—It is clear that the court had authority to amend the judgment entered on the 18th of June, 1868, so as to make it conform to the findings, and to the order of the court directing the judgment to be entered: Swain v. Naglee, 19 Cal. 127; Morrison v. Dapman, 3 Cal. 255; Hegeler v. Hinckell, 27 Cal. 492; Casement v. Ringgold, 28 Cal. 335; Leviston v. Swan, 33 Cal. 480; Atkins v. Sawyer, 1 Pick. (Mass.) 353. And I think it is equally clear that the judgment as amended and the relief granted thereby were within the issues, and were warranted by the pleadings. I am, therefore, of opinion that the judgment ought to be affirmed.

Ordered accordingly.

We concur: Wallace, J.; Rhodes, C. J.

WILLIAM MURDOCK, Respondent, v. G. W. WARE, Appellant.

No. 2583; October 27, 1870.

**Appeal—Conflicting Testimony.—On a Question Whether or not the defendant assumed the contract of a third person, the finding of the trial court, if had upon conflicting testimony, is not to be disturbed.**

APPEAL from Tenth Judicial District, Colusa County.

W. C. Belcher for respondent; C. D. Semple and W. F. Goad for appellant.

TEMPLE, J.—Upon an examination of the statement on motion for a new trial in this case we find some evidence, both in the testimony of the plaintiff and of Shearer, which tends to prove that Ware assumed the contract made between the plaintiff and Shearer, and agreed with plaintiff to become liable according to its terms. The plaintiff testified that Ware assumed the contract—plainly implying that he agreed to perform the contract—which had been made with Shearer. Ware testified to a different state of facts, but upon this point the court found in favor of the plaintiff, and there being a conflict of testimony, we cannot disturb the judgment.

Judgment and order affirmed.

We concur: Crockett, J.; Rhodes, C. J.; Wallace, J.

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LOUIS PERES et al., Respondents, v. JUAN SUNOL, Appellant.

No. 2024; November 25, 1870.

**Deed.—A Part Owner Who, Through the Fraud of His Co-owner by the medium of a deed pretending to effect an exchange of properties, believes he owns the whole of a tract and so conveys a half interest to a third party, also not knowing of the fraud, whereby he has nothing left, cannot, if on learning of the fraud he makes no effort to have**

the deed set aside but chooses rather to accept large compensation for the fraud, make a subsequent deed to a fourth party of whatever interest may remain in him, which last deed passes nothing at all.

APPEAL from Fifteenth Judicial District, Contra Costa County.

E. J. Pringle for respondents; H. Allen for appellant.

CROCKETT, J.—In the year 1852 Jose Noriega and Robert Livermore were the owners, in equal moieties, as tenants in common, of two separate ranchos—"Los Positas" and "Canada de los Vacqueros." In that year, Livermore conveyed all his interest in the two ranchos to his wife and children, by deed absolute, which was duly recorded. In the following year, and whilst Noriega was ignorant of the conveyance from Livermore to his wife and children, an agreement was made between Noriega and Livermore, whereby the former agreed to convey to the latter all his interest in the Positas rancho, in consideration of a conveyance by the latter to the former of all his interest in the Vacqueros rancho, and the payment of a sum of money. In other words, the interest of Noriega in the "Positas" was exchanged for the interest of Livermore in the "Vacqueros," together with a sum of money to be paid by Livermore. The contract for the exchange was consummated by mutual conveyances and the payment of the stipulated sum by Livermore. But Livermore had already conveyed all his interest in the "Vacqueros" rancho to his wife and children, of which fact Noriega was ignorant; so that the deed from Livermore to Noriega in fact conveyed nothing, inasmuch as Livermore had then no title to convey. But under the belief that he had acquired the title, by means of this conveyance, to Livermore's one-half of the rancho, Noriega conveyed to Corey one undivided half of it, believing at the time that he owned the whole. There is no pretense that any deception or fraud was practiced by Corey on Noriega; on the contrary, it is plain from the proofs that Corey was also under the belief that the deed from Livermore to Noriega was operative to convey to the latter one-half the rancho; and consequently, that he thereafter owned the whole. But it appears in the case that, after his conveyance to Corey, Noriega discovered the fact of the prior

conveyance from Livermore to his wife and children; and became aware for the first time that he had acquired no title under his deed from Livermore. Thereupon, it was mutually agreed between them that Livermore would pay, and Noriega would accept, the sum of six thousand dollars as a full satisfaction for the loss which the latter had suffered by reason of the failure of his title under the deed from the former; and this sum was accordingly paid. Noriega admits that the six thousand dollars exceeded the value, at that time, of one-half the rancho. Thus the transaction appears to have been adjusted to the mutual satisfaction of the parties, and no litigation ensued. But subsequently, Noriega conveyed whatever interest he had in the rancho to one Fernandez, who paid no consideration therefor, and the defendant deraigns title under this conveyance. This action is ejectment to recover a portion of said rancho; and the plaintiffs Peres and Altuba deraign their title under the deed from Noriega to Corey, and the plaintiffs Patterson and Miller under the deed from Livermore to his wife and children. From this statement of facts, it is evident the title is in the plaintiffs, unless the deed from Noriega to Corey was for some reason invalid and inoperative. At the time of its execution, Noriega had title to only one undivided half of the rancho, having acquired no title, for the reasons already stated, to the other half, under the deed from Livermore. His entire interest in the rancho, therefore, passed to Corey, if the deed to the latter was a valid and operative conveyance; and in that event, no interest remained in Noriega, to be afterward conveyed to Fernandez, under whom the defendant claims. The only ground on which the deed from Noriega to Corey is sought to be impeached is, that it was executed under a mistake as to the quantity of interest which Noriega owned in the rancho; which mistake was superinduced by the alleged fraudulent concealment by Livermore of his prior conveyance to his wife and children. As between Noriega and Corey, the only ground on which the deed to the latter could have been set aside, even in a court of equity, on a bill filed for that purpose, would have been that it was executed under a mistake of the parties to it, as to the quantity of interest which Noriega owned in the rancho. But Noriega made no effort to set it aside. On the contrary, he was paid by Livermore, and

accepted, full satisfaction for any loss he may have incurred by reason of Livermore's alleged fraud, or his own mistake, which was superinduced thereby. It is clear that after accepting this satisfaction from Livermore, he could have maintained no action to set aside the deed to Corey on the ground of mistake. No court of equity would have listened to such an application, after Noriega had accepted from Livermore a full indemnity for the loss suffered by the mistake; and particularly if there had been no offer to return or account for the money paid as such indemnity. But whatever right Noriega may have had, as against Corey, to vacate and set aside this deed in a court of equity, it is sufficient to say that he has made no effort to set it aside. That the deed was not void is too plain for argument; and even if it were voidable, the title subsequently acquired under it by purchasers for value, without notice, would be valid. But without pursuing the discussion further, the fact that after accepting a full indemnity from Livermore, Noriega could not have vacated or impeached his deed to Corey, in a direct proceeding for that purpose, in a court of equity, is decisive of this action. By that deed he conveyed to Corey his entire interest in the rancho; and consequently, his subsequent deed to Fernandez, under whom the defendant claims, conveyed no title, either legal or equitable.

Judgment affirmed.

We concur: Wallace, J.; Temple, J.; Rhodes, C. J.

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## BENJAMIN FLINT, Respondent, v. JOHN BELL, Appellant.

No. 2585; December 12, 1870.

**Public Land—Necessity of Survey.**—A Purchaser Under a Certificate of purchase acquires no rights by the certificate when the lands described in the latter have not, at the date of its issue, been as yet surveyed.

**Public Land.—If One Locating upon Unsurveyed Lands and not Entering** upon them fails, within three months after the filing of the

township map with the register, to present his claim to the lands, he loses all rights, as against a person who has in the meantime entered upon the lands and duly filed his declaratory statement as a pre-emption claimant.

APPEAL from Third Judicial District, Monterey County.

Wm. Matthews for respondent; Moore & Laine for appellant.

RHODES, C. J.—The plaintiffs rely for a recovery of the possession of the premises upon a certificate of purchase issued to their grantor in 1862 by the register of the state land office, and the confirmation of the selection of the land, by virtue of the act of Congress of the 23d of July, 1866, to quiet land titles in California: 14 U. S. Stats., p. 218. Neither they nor their grantors were at any time in the possession of the premises. The plat of the United States survey of the township, which includes the lands, was filed in the office of the register of the proper land district, December 13, 1866. There is no evidence that the plaintiffs have taken any steps to "present and prove up their purchase and claim," as provided for by the third section of the act.

The defendants entered upon the premises in May, 1869, and were in possession at the commencement of the action. They possess the requisite qualifications as pre-emptors, and have filed with the register their declaratory statements.

The certificate of purchase at the time it was issued was void, because the lands therein described had not then been surveyed, and the purchaser acquired no right in the land by virtue of the certificate: Terry v. Megerle, 24 Cal. 609, 85 Am. Dec. 84; Grogan v. Knight, 27 Cal. 517. The question presented for decision is whether the act of Congress of the 23d of July, 1866, had the effect, of its own force, and without any action on behalf of the holder of the certificate of purchase, to give him the right of possession as against the defendants, who entered as pre-emption claimants. The plaintiff's certificate falls within the third section of the act—that is to say, the selection was made of lands that had not been surveyed at the passage of the act.

The first three sections of the act were to some extent involved in Toland v. Mandell, 38 Cal. 30, and Hodapp v.

Sharp, 40 Cal. 69, and in those cases some of the provisions of these sections were construed. In Toland v. Mandell it was held that the third section, which gave to the selection of land, which at the passage of the act had not been surveyed, "the same force and effect as the pre-emption right of a settler upon unsurveyed public land," legalized the possession of the locator upon unsurveyed lands until he had an opportunity to present his claim, as provided in the act. Whether the locator, who has not entered upon the land, would have the right while the land remained unsurveyed, and for the period of three months after the plat of the survey of the lands has been filed in the register's office, to recover the possession of the land from a person who, after the passage of the act, entered upon the land as a pre-emption claimant, it is unnecessary, for the purposes of this case, to decide. But if he has permitted that period of time—the three months succeeding the filing of the township plat with the register—to expire, without having presented his claim to the lands, he has lost all right to the lands, as against a person who has in the meantime entered thereon and duly filed his declaratory statement as a pre-emption claimant. The holder of the certificate of purchase whose selection comes within the third section acquires title only when the land is certified over to the state by the commissioner of the general land office; and in order that this may be done, he is required to present and prove up his purchase and claim. For this purpose the act accords to him the status of a pre-emption claimant of unsurveyed land. One of the provisions of the act of Congress of March 3, 1853 (10 U. S. Stats., p. 246), is that the pre-emption claimant of unsurveyed land must file his declaratory statement within three months after the plat of the survey has been filed in the office of the register of the proper land district. And courts have no power to extend the time prescribed by the act: Megerle v. Ashe, 33 Cal. 74. To give an indefinite extension of time to the purchaser to present and prove up his claim would defeat the purpose of the act, which is to quiet titles to lands theretofore sold by the state. The purchaser acquires through the act the rights of a pre-emption claimant of unsurveyed land, and the principal right which he possesses is the right to acquire the title to the land, provided he shall file his claim—his declaratory statement—

within the specified time. The rights of the purchaser from the state of lands which were not surveyed at the time of the passage of the act are coupled with the same condition; and in order to avail himself of the benefits of the act (other than by way of protection as already mentioned of such possession as he may have), he must present his claim within three months after the filing of the township plat in the register's office.

Judgment reversed and cause remanded, with directions to render judgment for the defendant.

We concur: Crockett, J.; Temple, J.; Wallace, J.

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## JOSEPH PHELPS, Appellant, v. D. DAVIDSON, Respondent.

No. 2423; January 10, 1871.

**Mechanics' Liens—Intervention.—Lienholders, Properly Made Defendants** by the complaint in a suit to enforce a mechanic's lien, should not come in as interveners. But their petitions in intervention should be, on motion, allowed to stand as their answers, if containing all the allegations necessary to enable them to have their claims enforced as liens and to participate in the proceeds of the sale of the premises.

**Mechanics' Liens—Ninety Days' Limitation.**—In a suit to enforce a mechanic's lien, it is not the service of process upon the defendant that marks the beginning of the proceedings, but the filing of the complaint; and this filing, if within the ninety days, saves the limitation for each defendant lienholder named in it, since the court has jurisdiction of him by virtue of the filing of the complaint.

**Mechanics' Liens—Limitation of Actions.**—The objection that the causes of action of respective lienholders, made defendants by the complaint, for the enforcement of their liens, have been barred by the statute, can be taken only by answer or demurrer.

APPEAL from Fifth Judicial District, Tuolumne County.

E. O. Rodgers for appellant; C. Dorsey for respondent.

RHODES, C. J.—This action was brought under the mechanic's lien act of 1868: Stats. 1867–68 p. 598. The plain-

tiff made all the lienholders defendants, in accordance with the fifth subdivision of section 10. All the lienholders filed their respective petitions of intervention. On motion of the defendants, who are alleged to be the owners of the mine, the several petitions were dismissed. Thereupon the lienholders moved that their respective petitions stand as their respective answers, but the motion was denied.

The first subdivision of section 10 provides that the pleadings in an action brought under that act "shall be the same as in other cases" in the district courts; that is to say, the pleadings shall conform to the provisions of the code. The lienholders having been made defendants, and having, as such defendants, the right to present their claims for adjudication, were not authorized to change their position to that of interveners.

But their petitions should have been allowed to stand as their answers. They contain all the allegations which are necessary, in order to entitle them to have their claims enforced as liens, and to participate in the proceeds of the sale of the premises. The mere formal words, by which the pleadings are denominated petitions, and in which they claim the right to intervene as plaintiffs, may be stricken out as surplusage.

Objection is made by the defendants who own the premises that the petitions were not served upon them within ninety days after the filing of the liens, and that, therefore, the liens expired. The objection proceeds on the theory that, as the act requires an action to be commenced by a lienholder within ninety days after the filing of his lien, the action will not be deemed to be commenced by a lienholder, who is made a defendant to the action brought by another lienholder, until he has served on the party to be affected by the lien the pleading by which he asserts his claim and right to a lien. As the mechanic's lien act contains no provision regulating the proceedings in that respect, the practice, as well as the pleadings, is governed by the code.

An action is commenced when the complaint is filed and a summons is issued thereon, or is waived by the appearance, demurrer or answer of the defendants. The service of a copy of the complaint is not necessary for that purpose. Regarding the pleadings which were filed by the lienholders as stat-

ing a cause of action in their behalf, no reason is perceived why a copy of such pleadings should be served, in order that the action on their behalf should be deemed to have been commenced, that would not also apply to a complaint. So far as an argument can be drawn from the analogy between such pleadings and a complaint, it sustains the position of the lienholders. The court had already acquired jurisdiction of the defendants, and although the defendants would not be required to reply to the pleadings of the lienholders before they were served with those pleadings, yet the action was commenced by the lienholders when their pleadings were filed.

The objection that the causes of action of the respective lienholders for the enforcement of their liens were barred by the statute can only be taken by demurrer or answer.

Judgment reversed and cause remanded, with directions to permit the petitions of the lienholders to stand as their answers.

We concur: Crockett, J.; Wallace, J.; Temple, J.

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THOMAS WALLACE MORE, Respondent, v. PETER MASSINI, Appellant.

No. 2542; January 12, 1871.

**New Trial—Filing Affidavit Within Time.**—Under the Practice Act a party who intends to move for a new trial must file with the clerk of the trial court a statement or affidavit within the required time, the statement being "a proposed case."

**New Trial—Necessity of Filing Proposed Case.**—The court has no power to settle a proposed case not previously filed with the clerk, except by stipulation by the parties.

**Appeal—Service of Statement.**—Under the Practice Act, when a statement on appeal is proposed, a copy must be served upon the respondent, who may thereafter prepare his amendments and serve them upon the appellant.

APPEAL from First Judicial District, Santa Barbara County.

S. F. & J. Reynolds for respondent; Albert Packard for appellant.

See Moore v. Massini, 43 Cal. 389.

WALLACE, J.—We cannot disturb the order of the court below denying a new trial. The defendant has not pursued the steps required by the statute to enable us to review the proceeding of the court below in that respect.

The action was tried before the court sitting without a jury and findings were filed. Under section 195 of the Practice Act the defendant, if he intended to move for a new trial, was bound to file with the clerk of the court below a statement, or affidavit, within a prescribed time. This "statement" is, of course, a proposed statement, and one which is the subject of amendment and of settlement by the judge thereafter, if not agreed to by the adverse party. No such proposed statement was ever filed in this case. A proposed statement, which was never placed on file at any time, as such, was, however, settled and certified by the judge of the court below on March 20th, filed March 23d, and a copy of the settled and certified statement was left at the residence of the respondent More, in the hands of his wife. The statute does not require service of a statement on motion for new trial to be made upon the opposite party or upon his counsel. Such service, when required at all, is always by rule of court. It would be difficult to see for what purpose a statement already settled should be served, for it would only go to inform the party served that he had already been deprived by this ex parte proceeding of an opportunity to make his objections, if he had any, to the statement of his adversary. One of the steps required by statute in the proceeding to obtain a new trial is, that the proposed statement should be filed, and if it be not filed, the right to move is waived. The judge ought not, without the express stipulation of parties, to settle a proposed statement which had not been previously filed. Nor is the statement here sufficient as a statement on appeal. Section 338 requires that when a statement on appeal is proposed, a copy shall be served upon the respondent, who may thereafter prepare his amendments, and serve a copy of them upon the appellant. No such step was taken as to this statement, for, as we have already observed,

the only service (if service it was) that was ever made upon the respondent was after his opportunity to propose amendments had been cut off by an ex parte settlement of the statement already had in advance.

These steps prescribed by statute to be taken are intended to preserve the substantial rights of parties, by affording opportunities to so amend the proposed statement, whether on motion for new trial or on appeal, as to make it conform to the truth, and it was not intended that any suitors' rights should be affected here by an ex parte statement prepared by his adversary, without opportunity afforded for its correction, if desired.

In addition to this, the statement as found in the record contains no sufficient specification under the settled rule.

The judgment and order denying new trial are affirmed.

We concur: Rhodes, C. J.; Temple, J.; Crockett, J.

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## CHARLES D. SEMPLE, Appellant, v. GEORGE W. WARE, Respondent.

No. 2285; January 26, 1871.

**Appeal.—On an Appeal from the Judgment Alone,** supported by a statement on appeal, the question as to whether the proper judgment was rendered cannot be looked into, unless there are written findings or an agreed statement of facts forming a part of the judgment-roll.

APPEAL from Tenth Judicial District, Colusa County.

C. D. Semple and L. J. Ashford for appellant; W. F. Goad and W. C. Belcher for respondent.

See Semple v. Ware, 42 Cal. 619.

CROCKETT, J.—The record on this appeal presents precisely the same questions, which are considered in the case of Yates v. Smith, [38 Cal. 60], decided at the present term, with the exception that this case is now for the first time in this court,

and is therefore free from any embarrassment arising from a prior adjudication in this particular case of the questions which govern it; and we would, therefore, be at liberty to consider the relative values of the two titles which are involved in the action, provided the appellant had presented them in such a form as to enable us to look into them. If he had moved for a new trial, supported by a proper statement containing the evidence and assigning as a ground of the motion, that the evidence was insufficient to justify the judgment and the implied findings in support of it, we would have been at liberty, on an appeal from the order denying the motion, to consider the question whether the judgment and the implied findings were justified by the evidence. But in the case of Reed v. Bernal, decided at the present term, we held, after careful deliberation, that this question can only be presented in that method; and that on an appeal from the judgment alone, supported by a statement on appeal, we cannot look into the question whether the proper judgment was rendered, unless there were written findings or an agreed statement of facts forming a part of the judgment-roll. In this case there was no motion for a new trial, nor any written findings or agreed statement of facts; and on the authority of Reed v. Bernal we are not at liberty to look into the evidence to see whether it justified the judgment. All the other questions arising on the appeal are decided adversely to the appellant in the case of Yates v. Smith above referred to.

Judgment affirmed.

We concur: Wallace, J.; Rhodes, C. J.

Mr. Justice Temple, being disqualified, did not participate in the decision of this case.

CHRISTIAN J. MEGERLE, Respondent, v. RICHARD P. ASHE et al., Appellants.

No. 1635; January 31, 1871.

**Public Lands—Filing Plat.—In Actions Involving Rights of Holders** under the United States land laws, the transmission of the plat to the register by the surveyor general on a day named and its reception by the register on the succeeding day, together with the publication by the register and receiver in a public journal of a notice to settlers, requiring them to file their declaratory statements, are facts sufficient for a jury finding fixing the time when the plat was officially filed.

**Public Lands—Pre-emption—Warrant for School Land—Patent.** If it is proved that a plaintiff had all the qualifications of a pre-emption claimant, had filed his declaratory statement within three months after the official filing of the plat, had taken the other necessary steps to pre-empt the premises, and had procured the issue of a patent to himself, it is immaterial whether warrants for school lands in the defendant's name were properly located or not, or whether the patent was duly issued.

**Ejectment—Prima Facie Case.—In an Action of Ejectment** a plaintiff who has in his complaint made all the necessary averments may, at the trial, rest after putting in his proof of title, if the defendant has in his answer first denied everything contained in the complaint and then admitted possession, but not as a distinct defense.

**Judgment—Absence of Service or Appearance.**—Judgment may not be had against a defendant not served with process and who has not appeared in the action.

APPEAL from Fifth Judicial District, San Joaquin County.

G. W. Tyler for respondent; Patterson, Wallace & Stow for appellants.

See Megerle v. Ashe, post, p. 756; 33 Cal. 74; 47 Cal. 632.

RHODES, C. J.—On the last appeal in this action (33 Cal. 74), the only evidence of the time when the township plat was returned to the register's office at Marysville was an unsigned indorsement: "Filed December 5, 1855, Marysville Land Office"; and as both parties regarded the plat as having

been returned to that office, it was held that that indorsement was evidence—though slight—of the time when it was returned. On this appeal the record contains further evidence on that point. The parties stipulated that on the 4th of December, 1855, the surveyor general did officially transmit to the register the plat; and that on the 5th of December, 1855, the register received the plat at his office—the plaintiff reserving all legal objections as to the effect of these facts. And it was also stipulated that in February, 1856, the register and receiver at Marysville published in a newspaper, at that place, a notice to settlers in that township, requiring them to file their declaratory statements on or before the 15th of May, 1856—the defendants reserving the right to object to the admissibility of the notice as evidence. The parties renewed their objections to the respective stipulations when they were offered in evidence. The jury found that the plat was returned to and filed in the land office on the fifteenth day of February, 1856. There is no valid objection to the admissibility of the facts recited in the stipulations. The publication of the notice was regarded by the Secretary of the Interior as establishing the date of the official filing of the plat in the land office—as appears from his opinion, which is contained in the transcript in this case. The act of Congress of March 3, 1853, provides that the declaratory statement must be filed within three months after "the return of the plats of the surveys to the land offices." It could not have been intended by the act that settlers should be required to take notice of the return of the plat to the land office, before it was filed by the register, or, in some manner, kept in his office, so that persons, who might be affected by notice of its "nature" could have access to it as an official document belonging to his office. The Secretary of the Interior, in the opinion above referred to, does not seem to regard the return of the plat by the surveyor general as a full compliance with the act, but that an official filing of the plat by the register was requisite; and he regards the notice, which was directed to the persons who were to be affected by the filing of the plat, as fixing the time when it was officially filed by the register. There was, therefore, evidence tending to sustain the special finding of the jury, in respect to the time at which the plat was returned and filed. The plaintiff's declaratory statement

was filed within three months after that time; and it is shown that he possessed the qualifications of a pre-emption claimant. As he took the necessary steps to pre-empt the premises, and has procured a patent to be issued for the land, it becomes unnecessary to consider whether the school land warrants, introduced in evidence by the defendants, were properly located, or whether the patent was duly issued, or whether the court erred in its rulings or instructions in respect to those matters.

It is proper here to advert to an assertion of the plaintiff's counsel, lest our silence should be construed as an admission of its correctness. After saying that it may be, that if the defendants had introduced their state patent, the court would have presumed that the requisite steps had been taken to entitle the patent to issue, he asserts that "this court has held that a United States patent affords no such presumption." No case is cited as laying down that doctrine. I know of no case in this court in which the points decided or the arguments advanced in support of the decision, or even the language employed in the opinion, furnishes a shadow of support for the assertion.

On the trial the plaintiff introduced his patent and rested; and, thereupon, the defendants moved for a nonsuit, on the ground that the plaintiff had not shown that either of the defendants were in possession of the premises, at the commencement of the action, and the nonsuit was refused. The pleadings are not verified. There is no answer on the part of Ashe. Van Syckle and Flanders, by their answer, deny each and every allegation of the complaint; and deny that the plaintiff is or was seised or entitled to the possession of the premises; they also admit that they are in possession of all the premises, except a tract of about eight acres, and aver that they are lawfully and rightfully in possession thereof, and deny that they are in possession of the eight acre tract; and they deny that they are in possession of any part of the premises, except the portion already admitted to be in their possession; and they deny that the plaintiff is seised or entitled to the possession thereof; and they aver that Ashe is seised in fee thereof, and that they are in possession as his tenants. The denials are in the disjunctive, both as to person and time. It thus appears that there are no matters alleged

in the answer which the defendants might not have proved under their general denial. They were entitled to show that the plaintiff was not, but that Ashe was, seised in fee, and that they were his tenants of all of the premises, except the eight acre tract, as well without as with an averment of these facts. The admission of their possession is not coupled with, nor does it form a portion of, a distinct defense to the cause of action. They cannot, therefore, avail themselves of the rule in Youngs v. Bell, 4 Cal. 202, Klink v. Cohen, 13 Cal. 623, Bell v. Brown, 22 Cal. 672, and Uridias v. Morrell, 25 Cal. 36, that an admission of a fact which constitutes a portion of a distinct offense, but which is denied in another defense, will not be deemed and taken as an admission, so as to dispense with proof of such fact. The repetition of a portion of the denial of all the allegations of the complaint, by averring that the plaintiff is not seised of a certain portion of the premises, because defendant Ashe is seised thereof, or that the plaintiff is not entitled to the possession, because they are entitled to the possession as the tenants of Ashe does not constitute a distinct and separate defense, but is only a portion of the general denial diluted; nor are those allegations converted into separate defenses, by their being coupled with an admission that they are in possession of such portion of the premises. The plaintiff was entitled to avail himself of that admission on the trial. In the motion for a nonsuit the ground was not taken that there was no proof that the defendants were in possession of the eight acre tract. The motion as to Van Syckle and Flanders was properly denied.

The judgment as against Ashe cannot be sustained, because he was not served with process, nor was his appearance in the action entered, nor was an answer or demurrer filed on his behalf.

None of the remaining points presented by the defendants relate either to the question of possession of the premises by the defendants, or to the question upon which the case mainly hinges—that of the time of the filing of the township plat—and they need not be considered; for there is no room to doubt that the plaintiff acquired the title to the premises if he filed his declaratory statement in time, which the jury, in effect, found when they found that the plat was filed February 15, 1856.

Judgment against Ashe reversed, and judgment against the other defendants affirmed.

We concur: Temple, J.; Sprague, J.

I dissent: Crockett, J.

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J. W. WILBUR, Respondent, v. C. F. SANDERSON, Appellant.

No. 2417; April 10, 1871.

**Pleading.—A Complaint Containing Several Counts Setting Forth Separate causes of action is sufficient if any one of the counts so contained is good.**

APPEAL from Twelfth Judicial District, San Francisco County.

Burnett & Burnett for respondent; E. A. Lawrence for appellant.

See Wilbur v. Sanderson, 43 Cal. 496.

CROCKETT, J.—The only point urged on this appeal by the defendant and appellant is, that the complaint does not state facts sufficient to constitute a cause of action. The complaint contains several counts setting forth several separate and distinct causes of action. If either of the counts is good, the point now made (and which is made for the first time in this court) cannot avail the appellant. Even if it be conceded that one of the causes of action set forth in the complaint is amenable to the objections urged by the defendant (a point not necessary to be decided), no defect has been shown or is perceived in the other counts. The complaint being sufficient, the appellant has failed to show any error in the record.

Judgment affirmed, with twenty per cent damages.

We concur: Temple, J.; Rhodes, C. J.; Wallace, J.; Sprague, J.

S. RATHBUN, Appellant, v. J. H. ALEXANDER et al., Respondents.

No. 2398; April 13, 1871.

**Mining Ground—Right of Occupant as Against Intruder.**—One in actual possession of mining ground, although without title, may proceed against a mere intruder having no superior right of entry.

**Ejectment.—In an Action for the Possession of Land,** failure by the plaintiff to prove actual possession by him of all the land described in the complaint does not call for a nonsuit if he has proved possession of a part.

APPEAL from Eleventh Judicial District, Calaveras County.

W. L. Hoskins and W. L. Dudley for appellant; James T. Farley for respondents.

CROCKETT, J.—If the plaintiff established the actual possession of any portion of the mining ground in controversy at the time of the defendants' entry, the nonsuit was improperly granted. As against a mere intruder, having no better right of entry than himself, if the plaintiff had the actual possession, he is entitled to be protected in it; and this court has had occasion in several cases to consider what acts of dominion will constitute an actual possession of mining ground: English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574; Hess v. Winder, 30 Cal. 349. I think the plaintiff brought himself clearly within the rule established in these cases as to a portion, if not to the whole, of the ground in contest. The testimony certainly tended strongly to establish the actual possession of the plaintiff as to a portion, at least, of the demanded premises; and this made out a prima facie case against the defendants as to this portion, at least. The nonsuit was improperly granted.

Judgment reversed and cause remanded for a new trial.

We concur: Rhodes, C. J.; Wallace, J.; Sprague, J.; Temple, J.

GEORGE G. BLANCHARD, Respondent, v. JOHN M. KAULL, Appellant.

No. 2101; April 20, 1871.

**Partnership—Promissory Note.—In an Action Against Many Named Persons** jointly as partners to enforce a promissory note made by three of them, describing themselves in the body of the note as "we as trustees of," etc., a judgment may be given against the signers alone if no proof is produced at the trial that they acted under authority of the others.

**Partnership—Promissory Note.—Although in a Suit Against Many Persons** to enforce a note signed by three of them, describing themselves in the body of the instrument as trustees, the complaint sets up that all are partners, and the answer that they comprise a corporation, judgment may be taken against the signers as individuals, provided there is a failure at the trial to prove either partnership or corporation, or that the three had signed by the authority of the others.

APPEAL from Eleventh Judicial District, Amador County.

Blanchard & Irwin for respondent; J. W. Armstrong & Cadwalader for appellant.

See Blanchard v. Kaull, 44 Cal. 440.

TEMPLE, J.—This action is brought against some thirty defendants averred to be partners, jointly engaged in the construction of a certain wagon road under the firm name and style of the Amador and Nevada Wagon Road Company. It is charged that the defendants, by their firm name, through the agency of three of said partners, to wit: Kaull, Nikolaus and Tullock, who were duly authorized to act for and in the name of the partnership, executed and delivered the notes sued upon, all of which are in substantially the same language. One of said notes is as follows:

"($3590.50.) Twelve months after date we, as trustees of the Amador and Nevada Wagon Road Company, promise to pay to Louis Nikolaus, or order, the sum of three thousand five hundred and ninety dollars and fifty cents, in gold coin of the United States of America, with interest thereon at

the rate of two per cent per month from date until paid; the interest to be paid at the expiration of every two months. And if said interest is not paid at the expiration of every two months, the interest then due shall be added to the principal, and draw interest at the rate of two per cent per month until paid. For (value) received, this 3rd day of December, A. D. 1863.

(Signed) "JOHN M. KAULL,
"LOUIS NIKOLAUS,
"J. T LLOCK,
"Trustees of the Amador and Nevada Wagon Road Company."

It is also averred that the notes were secured by mortgage, which is also sought to be foreclosed in this action. The mortgage is set out in full and purports to have been executed by the Amador and Nevada Wagon Road Company, a corporation duly incorporated, party of the first part. In no other way does the complaint show that the defendants are members of an incorporated company. The answer avers that the Amador and Nevada Wagon Road Company is an incorporated company, and that the notes and mortgage mentioned were executed by that corporation, and not by the defendants in their individual capacities.

On the trial no partnership was proven, nor any authority from the corporation to execute the notes and mortgage. Thereupon the notes were treated as the individual notes of the persons signing them, and judgment given against them, and the action dismissed as to the other defendants.

It is claimed that this judgment is erroneous, because the relief granted is not consistent with the case made in the complaint, nor within the issues raised by the pleadings; and also because the evidence shows that the notes were not the private contracts of the defendants against whom judgment was rendered, but of the corporation.

I do not deem it material to discuss the question whether the defendant's company was duly incorporated or can be recognized as such under the first section of the statute of April 8, 1862 (Stats. 1862, p. 110). No authority is shown from such company to execute the notes, and in this form of action, it being brought against the agents upon the con-

tract, and not against them for damages, I cannot see that it is material whether they were a valid corporation or not.

So far as the complaint is concerned, it substantially avers that the defendants against whom judgment was entered, with others as partners, executed the notes sued on in the partnership name. This is an averment that the contracts were executed by Kaull, Nikolaus and Tullock, and upon this averment a several judgment could have been rendered against them. It cannot be claimed that plaintiffs were bound to prove that all the numerous parties sued as partners were, in fact, such, or fail to recover. Had they proved all the other facts set out in the complaint, and had simply failed to establish the partnership as to one of the defendants, they might, nevertheless, recover against the others. The fact of partnership is not, however, a fact material to the liability of the defendants. This depends upon the question whether they executed the notes. The allegation is that they did execute the notes as their contract, and also for various other parties, for whom they were authorized to act. I think the judgment is supported by the complaint, notwithstanding the fact that it was framed upon the theory that the defendants were liable as partners.

I think the defendants are liable upon this contract in the capacity both as principals and as agents executing the contract without authority. So far as their liability as agents is concerned, the correct doctrine is laid down in Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64. A principal may ordinarily be held liable, notwithstanding the contract is, in form, the contract of the agent. The agent will be held liable, also, if he contracts in his own name, although it appear upon the face of the contract that he does so on account of or for his principal. If he has entered into the contract without authority, he will, ordinarily, be held liable for all damages which may result from his wrongful assumption of authority. If, however, the contract contain apt words to make it the undertaking of the agent, although it purport to be made as agent, and the name of the principal is disclosed, as a note in this form: "I, A B, as agent for C D, promise," etc., signed "A B," if the agent in fact had no authority, he will be held on the contract. If, however, the fact of agency is proven, this would be the contract of the principal, and the agent could

not be held. If the language of the contract purport to be a contract made by the agent, the false statements as to the agency will be rejected. I do not think this conclusion at all at variance with Sayre v. Nichols, 7 Cal. 538, 68 Am. Dec. 280, and cases which have followed it, and it is in exact accord with Hall v. Crandall, supra.

No valid mortgage was proven, and I do not think the mere averment of it, and the proof of an abortive effort to execute a mortgage, will prevent the plaintiffs from taking personal judgment against those shown to be liable.

The judgment is affirmed.

We concur: Sprague, J.; Rhodes, C. J.; Wallace, J.; Crockett, J.

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## FERDINAND VASSAULT, Appellant, v. EDWARD C. KIRBY, Respondent.

No. 1969; April 28, 1871.

**A Judgment on the Pleadings, on a Motion Therefor, can be Rendered** only on averments of the pleadings, admitted or not denied, justifying a judgment on one side or the other as the case may be.

**Pleading—Averments not Expressly Denied are Admitted.**—An averment of a complaint which the answer, not denying expressly, by its language leaves it merely to be inferred to be denied is, under the rules of pleading, admitted.

**Contract—Time to Accept of Essence.**—When, under the terms of a contract, so many days are given by one party to the other in which to make up his mind whether he will accept, time is always of the essence.

**Contract—Manner of Acceptance.**—Except When so Expressed in the contract, acceptance of its terms, where time has been allowed to decide in, need not be by word of mouth, but the accepting party may apprise the other of his decision by a note left at his place of business within the time.

APPEAL from Twelfth Judicial District, San Francisco County.

Harmon & Estee for appellant; Campbell, Fox & Campbell for respondent.

See Vassault v. Austin, 32 Cal. 597; Vassault v. Austin, 36 Cal. 691; Vassault v. Edwards, 43 Cal. 458.

CROCKETT, J.—This is an action to compel the specific performance of a written contract for the conveyance of a lot of land in the city of San Francisco. The defendant filed an answer to the complaint, and on the trial the plaintiff moved for a judgment against the defendant on the pleadings. A similar motion was made by the defendant for judgment against the plaintiff, both of which motions were heard together, and the plaintiff's motion was denied, and the defendant's granted. From this ruling the plaintiff has appealed.

The written contract is set out in the complaint and bears date April 21, 1868; but the complaint avers that it was, in fact, executed on the 22d of April. The contract states that on that day the defendant had sold to the plaintiff the lot in contest, for the price of twelve thousand dollars in gold coin, of which the defendant had received fifty dollars as part payment; that the sale was "subject to a search of, and an approval of the title," and that if the title was rejected as bad, the defendant was to refund the fifty dollars advanced, but if the title was approved, the defendant was to convey the property, on the payment of the remainder of the purchase money; and the last clause of the contract is in the following words: "And I hereby allow fifteen days for the approval or rejection of the title to said lot." The instrument was signed by both parties.

In order to decide whether judgment was properly rendered for the defendant on the pleadings, it becomes material to ascertain what facts the pleadings admit to be true. A judgment on the pleadings upon a motion for judgment, and not on a submission of the cause on the pleadings and proofs, can only be rendered when, on the material facts admitted or not denied, the judgment should be for the one side or the other, as the case may be. The complaint, after setting out the contract, and averring that it was, in fact, executed on the 22d instead of the 21st of April, proceeds to state that on the seventh day of May, 1868, and within fifteen days after the execution of the contract, the plaintiff, being satisfied with the title, called repeatedly at the defendant's usual place of business, within the usual business hours, for the purpose of notifying him that the title was approved, and

to tender the remainder of the purchase money, but was unable to find the defendant or to learn where he was; that being unable to find the defendant, he left a note for him, on that day, at his said place of business, stating his readiness to complete the purchase in accordance with the contract; that on the following morning (May 8th), the defendant called on the plaintiff, and after exhibiting the note left for him by the plaintiff, refused to convey the lot, or to proceed further in the transaction; that on the 7th of May, the defendant intentionally remained absent from his place of business, and concealed himself from the plaintiff, in order to prevent a tender of the purchase money, and to keep the plaintiff from notifying him that the title was approved and that he would take the lot on the terms agreed upon; that on the 23d of May, he tendered the purchase money and a proper deed of conveyance for execution by the defendant, and requested a conveyance, which was refused and the defendant yet refuses to convey.

The answer admits the execution of the contract and the payment of the fifty dollars; but denies that it was executed on the 22d of April, and avers that it was executed on the day it bears date (April 21st); it also denies that "within fifteen days after the execution of said agreement, plaintiff called during business hours at the Bank of British North America, defendant's usual place of business, or at any place, for the purpose of finding him or notifying him of his, plaintiff's, approval of said title, or that he, plaintiff, would take said real estate described in said agreement at the price stated, or at any price," or for the purpose of tendering the purchase money, or for any purpose; and alleges that the plaintiff did not, at any time within the time specified in the contract, notify or attempt to notify the defendant in any way, or at any place, that he approved the title or was ready or willing to consummate the purchase or pay the purchase money; but, on the contrary, neglected and failed to perform either of those acts, within the fifteen days specified in the contract, or until after said time had fully elapsed; and it denies that on the 7th of May, or at any time, the plaintiff left at the defendant's usual place of business, or at any place, for the defendant, a note of the character described in the complaint, or any note; it also denies that the defendant, on the

7th of May or at any time, absented himself from his usual place of business or secreted himself from the plaintiff, for the purpose stated in the complaint; but, on the contrary, during the whole of said fifteen days, the defendant was at his usual place of business during business hours, performing his accustomed duties; and that on the 6th of May (which he avers was the fifteenth day after the execution of the agreement), he remained at his place of business until a later hour than usual, for the sole purpose of giving the plaintiff an opportunity to notify him of his approval or rejection of the title; it admits that on the 23d of May the plaintiff tendered some money and a deed to be executed; but denies that the tender was duly made or the deed was a proper deed of conveyance, or that it was done in accordance with the contract. The answer then avers that on the 8th of May, the defendant notified the plaintiff that he (the defendant) was no longer bound to sell the lot to the plaintiff under the contract, and would not sell the same to him, but offered to refund the fifty dollars, which the plaintiff refused to accept, and still refuses.

On one point the answer must be deemed evasive. The complaint avers that on the 7th of May the plaintiff repeatedly called at the defendant's place of business to notify him that the title was approved and to tender the purchase money; but was unable to find the defendant, after diligent search and inquiry. In reply to this averment, the answer does not deny that the plaintiff called for the purpose stated on the 7th of May, but denies that he called "within fifteen days after the execution of said agreement"; and averring that the contract was executed on the 21st of April, the fifteen days expired on the 6th of May. This averment of the complaint must therefore be deemed to be admitted, except in so far as it is inferentially denied by the allegation in the answer that the defendant, from the time of the making of the contract, up to the time of filing the answer, had never secreted himself for the purpose alleged, "but on the contrary thereof, defendant alleges that on each and every day (excepting Sundays) since the making of said agreement to the present time, and during all business hours, to wit, from 9 o'clock in the morning until 4 o'clock in the afternoon, defendant has been regularly at his usual place of business,

to wit, the Bank of British North America, on California street, between Montgomery and Sansome streets" (which was well known to plaintiff to be his usual place of business), and attending to his usual business, in the ordinary and usual course thereof. This argumentative denial of a specific averment is not admissible in pleading. If the defendant intended to put in issue the specific averment that on the 7th of May the plaintiff called repeatedly at his place of business, for the purpose stated, and was unable to find him, he should have explicitly denied this fact in the answer; but, as we have seen, there was no denial on this point, except by inference, which, in pleading, is equivalent to no denial at all. In framing the answer, the pleader doubtless proceeded on the theory that the contract was made on the 21st of April, and that the fifteen days expired on the 6th of May. Consequently, that it was immaterial whether or not the plaintiff made any effort, successful or otherwise, to find the defendant on the 7th of May; and for that reason, perhaps, it was not deemed necessary to put in issue that portion of the complaint.

From this summary of the pleadings it appears that the following facts were admitted and none others, to wit: 1st. That the written contract set out in the complaint was duly executed and delivered; but the time when it was made is in issue; 2d. That fifty dollars on account of the purchase money was paid at the time of executing the contract; 3d. That on the 7th of May the plaintiff called at the defendant's place of business several times for the purpose of notifying him that the title was approved and to tender the purchase money, but failed to find the defendant; 4th. That on the 8th of May the defendant notified the plaintiff that he considered himself as no longer bound by the contract, and declined to proceed further in the business; 5th. That on the 23d of May, the plaintiff tendered some money and a deed to be executed by the defendant, which he declined to execute and refused to accept the money.

On these facts was the defendant entitled to judgment? In the solution of this question we are not at liberty to assume that the written contract was executed on the 21st of April. That fact is directly put in issue by the pleadings, and until there is a trial of the issue, we are unable to decide whether

it was in fact made on the 21st or 22d of April. For the purposes of the motion by the defendant for judgment, it was the duty of the court to assume that this disputed fact was found in favor of the plaintiff; for it is evident there could be no judgment against the plaintiff on the pleadings, founded on the assumption of a material fact, which he denied. But assuming the contract to have been executed on the 22d of April, as claimed by the plaintiff, was the defendant nevertheless entitled to judgment on the admitted facts? If the contract was made on the 22d of April, the fifteen days expired on the 7th of May; and plaintiff had the whole of that day, by the terms of the contract, and under the well-known rule for computing time in such cases, within which to notify the defendant that he approved the title and had decided to take the lot. As we have seen, the pleadings admit that on that day he made diligent, but unsuccessful, efforts to find the defendant at his usual place of business, for the purpose of giving him the necessary notice. Was this sufficient, or was it incumbent on the plaintiff, on pain of losing the benefit of the contract, actually to give the required notice? Would no amount of unsuccessful diligence suffice? Would no accident, however unavoidable, excuse the omission? Suppose the defendant, not for the purpose of defeating the contract, but for some sufficient and proper cause, had, on that day, been absent from his home and place of business, so that he could not be personally notified, would this excuse the plaintiff, or if the plaintiff had been prevented by some sudden and unavoidable calamity, from giving the notice on the precise day, would this be a sufficient excuse? The plaintiff insists that time is not of the essence of this contract, and that he was not bound to perform it within the fifteen days. But this proposition is not tenable. It is not a question whether a contract, once entered into, must be strictly performed within the specified time; but the point here is, that the plaintiff was allowed fifteen days to decide whether or not he would enter into the contract of purchase at all. Up to that time he had not bound himself to purchase, except on a condition that the title proved satisfactory. He was allowed fifteen days to solve this doubt, and to decide whether or not he would enter into the contract of purchase. It was obviously the intention of the parties to limit the time to the

fifteen days. Both the parties so understood it, and hence the plaintiff made a great effort, as he alleges, to perform the condition within that period, and the defendant claimed to be released as soon as the time had expired. Time, therefore, was of the essence of the contract, and it was incumbent on the plaintiff to give the notice within the fifteen days, unless a strict performance of this condition may be excused, and unless he has shown a sufficient excuse. The general rule in respect to the performance of conditions precedent is, that they must be strictly performed, unless a performance has been prevented or waived by the other party, or has been prevented by the act of God, or a public enemy. It is not claimed that this case falls within either of these latter categories; but it is insisted that the plaintiff did all he could to perform, and that his failure to give the notice to the defendant personally on the 7th of May was caused by his inability to find the defendant at his place of business on that day. It is not one of the admitted facts that the defendant intentionally absented himself on that day to prevent a performance by the plaintiff; on the contrary, this fact is not only explicitly denied, but the defendant further denies that on that day he was absent from his place of business in the usual business hours, unless it may have been temporarily, for short periods, in the performance of his ordinary duties. We must assume, therefore, that the failure of the plaintiff to find the defendant was caused by no fraudulent conduct or violation of duty by the latter, but was the result of his temporary absences during the day, in the usual course of his business, and without fault upon his part. The defendant, therefore, was in no default and did nothing of which the plaintiff can complain, as tending to prevent a performance by him. Whilst the defendant was in the performance of his ordinary daily duties at his usual place of business, if his occasional, temporary absences, for his usual business purposes, prevented the plaintiff from giving the required notice to the defendant in person, in no just or legal sense can it be affirmed that the failure of the plaintiff was caused by the defendant. It was not incumbent on the defendant to depart from his usual business habits during the fifteen days, in order to increase the opportunities of the plaintiff to give the notice; and the plaintiff took the hazard of being able and

finding an opportunity to give the notice within the specified time, provided the defendant did nothing to obstruct him. But was it indispensable that the notice should be given to the defendant in person; and if so, does the complaint show that it was so given, by means of the note left at his place of business? If it does not sufficiently appear from the complaint that the note was actually received by the defendant on the 7th, was the leaving of the notice at the defendant's usual place of business on that day a compliance with the contract in that behalf? The contract does not, in terms, stipulate that any notice shall be given; but, as already indicated, we think its legal effect rendered it incumbent on the plaintiff to make his election, and notify the defendant of it, within the fifteen days. But the contract is wholly silent as to the mode of giving the notice; and in the absence of a stipulation on that point, any mode of giving it would be sufficient whereby the plaintiff distinctly informed the defendant that he accepted the title, and was ready and willing to complete the purchase. The complaint, after alleging that the plaintiff repeatedly called at the defendant's place of business on the 7th of May to give him the required notice, and that he was unable to find him, avers that on that day he left a note for the defendant at said place of business, "stating his readiness to complete said purchase, in pursuance of the terms of said agreement"; that on the next morning the defendant called on the plaintiff, exhibited the note left by the plaintiff the day before, and informed him that he would not proceed further in the business. If these facts be conceded to be true, as they must be for the purpose of the defendant's motion for judgment on the pleadings, it not only appears that the requisite notice was left for the defendant on the 7th, but the presumption would be strong that he received it on that day. But whether he actually received it on the 7th or not, we think the leaving of the notice at his usual place of business, under the circumstances stated in the complaint, was a sufficient compliance with the requirement of the contract in this respect.

Judgment reversed and cause remanded for a new trial.

I concur: Sprague, J.

We concur in the judgment: Temple, J.; Rhodes, C. J.

## PEOPLE ex rel. C. VEJAR, Respondents, v. JACOB METZKER, Appellant.

No. 2462; May 4, 1871.

**Municipal Corporation—Right of Councilman to Office.—The District Court has no jurisdiction of the question of the right of a person to hold the office of common councilman of the city of Los Angeles, since the law devolves the duty and confers the power of decision in that regard upon the body of the common council.**

**Municipal Corporation—Right of Councilman to Office.—Chapter 5 of the Practice Act does not repeal by implication section 10 of the act of March 11, 1850, to the extent of devesting the common council of a city, organized under the provisions of the act, of the exclusive jurisdiction conferred thereby over the question of a person's right to hold office as a member.**

APPEAL from Seventeenth Judicial District, Los Angeles County.

Glassell, Chapman & Smith for respondents; Thorn & Ross for appellant.

See People v. Metzker, 47 Cal. 524.

SPRAGUE, J.—The demurrer to the complaint should have been sustained, upon the ground that the court has no jurisdiction of the subject matter of the action.

By special act of the legislature, entitled "An act to incorporate the city of Los Angeles," passed April 4, 1850 (Stats. 1850, p. 155), the city of Los Angeles was incorporated according to the provisions of the general act entitled "An act to provide for the incorporation of cities," approved March 18, 1850 (Stats. 1850, p. 87). The tenth section of this latter act vests in the common council of a city, organized under the provisions of the act, the power, and makes it their duty, to "judge of the qualification, elections and returns of their own members, and other officers elected under this act," and to "determine contested elections."

Jurisdiction of the subject matter involved in this proceeding is specially conferred upon the common council of the city of Los Angeles by the direct terms of the act, by virtue

of which it was originally organized, and continues to exist as a municipal corporation, and to the extent of the jurisdiction thus conferred it is exclusive and, within its legitimate scope, independent of the judicial department, except by proper proceeding to compel action within, and restrict action to, the statutory limits.

The district court, therefore, had no jurisdiction of the questions involved in the plaintiff's claim or defendant's right to hold the office of common councilman of the city of Los Angeles, as the law devolves the duty and confers the power of deciding who is entitled to the office upon another tribunal; and to that special tribunal must plaintiff resort for a determination of the matters presented by his complaint: Batman v. Megowan, 1 Met. (Ky.) 538; Necum v. Kirtley, 13 B. Mon. (Ky.) 517; State v. Jarrett, 17 Md. 327; Grier v. Shackelford, 2 Treadway Const. (S. C.) 642; Commonwealth v. Meeser, 44 Pa. 343; Whitney v. Board of Delegates, 14 Cal. 479.

Chapter 5 of the Practice Act does not, in our judgment, repeal by implication the tenth section of the act of March 11, 1850, to the extent of devesting the common council of a city, organized under the provisions of the act, of the exclusive jurisdiction conferred thereby over the matters involved in this proceeding.

If the jurisdiction thus conferred has practically resulted in the abuses suggested by respondent, application for relief should be made to the legislature, and not to the judicial department of our government.

Judgment reversed and cause remanded, with directions to the court below to sustain the demurrer and dismiss the proceeding.

We concur: Temple, J.; Rhodes, C. J.; Crockett, J.

## EUGENE B. DRAKE, Appellant, v. C. DUVENICK et al., Respondents.

No. 1785; May 12, 1871.

**Judgment—Defective Service.—Acquiescence in a Judgment for Ten Years,** the rights of third persons having supervened, estops a defendant to question it on the ground of defective proof of service of process, even though the ground might have been good on motion to quash made before judgment rendered.

**Appearance.—Irregular Service of Process is Cured** by the defendant subsequently appearing and putting in his answer.

**Process—Service on One Defendant.**—Under the practice prevailing by statute in 1856, if several defendants resided within three miles of the county seat of the county in which suit was brought, service of the complaint upon one of them was service upon all.

**Judgment—Irregular Service—Collateral Attack.**—A judgment rendered in a suit begun by an irregular service of the summons and complaint, or of either, may not be attacked in a collateral action as void for want of jurisdiction.

**Process—Irregular Service on One Defendant.**—Irregular service of process upon a defendant does not relieve a codefendant, regularly served, from the judgment in the case rendered subsequently.

APPEAL from Fifteenth Judicial District, San Francisco County.

Drake & Kent for appellant; George & Cary for respondents.

See Drake v. Duvenick, 45 Cal. 455.

CROCKETT, J.—The plaintiff and defendants both claim title to the premises in controversy under Thomas Dorland; the latter, under a foreclosure sale and sheriff's deed, and the former, under a conveyance from Dorland, made more than ten years thereafter. At the trial, the defendants put in evidence the judgment-roll in the foreclosure suit, which was objected to by the plaintiff, on the ground that it affirmatively appeared therefrom that Dorland was not served with process and did not appear in said action; and consequently, that the court did not acquire jurisdiction of his person, and the judgment was therefore void as to him. The court, how-

ever, admitted the record in evidence and entered a judgment for the defendants, from which, and from an order denying a motion for a new trial, the plaintiff appeals. The principal question in the case is, whether or not it sufficiently appears in the judgment-roll in the foreclosure case that the court acquired jurisdiction of the person of Dorland. The proof of service upon him, as found in the judgment-roll, consists of the affidavit of one Comstock, in which he states that he "personally served a copy of the summons in this action on the defendant Thomas Dorland" in the city of San Francisco, on the 11th of February, 1856; and he further states, that on the 13th of February, 1856, he served a copy of the complaint and summons "on defendants Robinson and Mead, by serving said papers on their attorney in fact, Mr. Ladd, personally," in said city. It is objected to this proof of service on Dorland: Ist. That it does not appear that a copy of the summons was delivered to Dorland personally as required by law; 2d. That it does not appear that a copy of the complaint and summons was delivered to some one of the defendants as was required in such cases, as the law then was. It is true the affidavit does not distinctly state, in terms, that a copy of the summons was delivered to Dorland in person; and if a motion to quash the proof of service, on the ground that it was not sufficiently certain, and was irregular, had been made at the time, it ought, perhaps, to have been granted. But after Dorland has acquiesced in the judgment for ten or twelve years, and rights of property have vested under it, he or his grantee will not now be permitted, in a collateral action, to assail the judgment, on the technical ground that the proof of service is not quite as full and accurate as it should have been. In such a case, all reasonable doubts must be solved in favor of the sufficiency of the service. The language of the affidavit is that he personally served a copy of the summons on Dorland. This may well be construed, without torturing the language, as a somewhat awkward and clumsy method employed by an illiterate or unskillful person of expressing the fact that he delivered to Dorland, personally, a copy of the summons; and we think it should be so construed, in support of the judgment, on a collateral attack; and particularly after the lapse of so many years, and after valuable rights have vested under

the judgment. In respect to the service of a copy of the complaint, the affidavit states that copies of the complaint and summons were served on two of the defendants, by serving them "on their attorney in fact, Mr. Ladd, personally." Standing alone, this was no proof of service on the two defendants; but it appears from the judgment-roll that said defendants Robinson and Mead afterward appeared and answered the complaint. From this, it would not be a violent presumption to infer that they received from their attorney, Mr. Ladd, copies of the complaint and summons, delivered by Comstock. But whether this be so or not is not material, under my construction of section 28 of the Practice Act, as it stood in 1856, and which provided that if there be several defendants residing within three miles of the county seat of the county in which the action is pending, a copy of the complaint need be served on only one of such defendants. The only object of this provision was to require the plaintiff to furnish to some one of several defendants residing in close proximity to each other a copy of the complaint, for their mutual benefit, and to inform them of the precise nature of the action. A service of the summons on each of the defendants, without service of a copy of the complaint on any one of them, would doubtless be irregular and might be set aside, on a proper motion, made in due time. But such a service would not be absolutely void, and a judgment rendered after due service of the summons cannot be attacked in a collateral action as void for want of jurisdiction. A failure to serve a copy of the complaint on some one of the defendants was, at most, but an irregularity in the service, to be corrected on motion; but did not affect the jurisdiction of the court over the person of a defendant duly served with a summons. If a contrary rule prevailed, there would be but little safety to purchasers at judicial sales, under judgments against several defendants, rendered by default. The judgment-roll might show a due service of the summons on all the real defendants; whilst the copy of the complaint may have been delivered to a merely nominal defendant, having no interest in the controversy, and upon whom the judgment-roll might fail to show any service whatsoever. If the judgment-roll in such a case was offered in evidence in a collateral action, must it be deemed a nullity, as to the defendants, duly served

with the summons? I think such a result could not have been within the contemplation of the legislature, when it enacted section 28 of the Practice Act, as it stood in 1856. I discover no error in the record.

Judgment affirmed.

We concur: Temple, J.; Sprague, J.

Rhodes, J., and Wallace, J., dissented.

PETITION FOR REHEARING.

See Drake v. Duvenick, 45 Cal. 455.

RHODES, C. J.—We might well have declined to consider the plaintiff's petition for a rehearing, on account of its indecorous tone. But construing the offensive language as indicating an apparent ignorance of professional decorum, rather than an intentional disrespect to the court, we have considered the petition; and entertaining some doubt on the points discussed, we deem it better that the cause should be reargued.

Rehearing granted.

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PEOPLE, Respondent, v. R. S. VINCENT, Appellant.

No. 2861; July 10, 1871.

**Malicious Mischief — Injuring County Jail.** — Conviction for malicious mischief, in breaking the doors and otherwise injuring the jail of Tulare county, sustained.

Attorney General for respondent; S. C. Brown for appellant.

TEMPLE, J.—The defendant was indicted for fraudulent and malicious mischief for breaking down the doors and otherwise injuring the jail of Tulare county. To this indictment he plead guilty and was sentenced to pay a fine of one

hundred dollars and be imprisoned in the state's prison for one year. The appellant has not appeared in this court by counsel or otherwise. On inspection of the record we discover no error and the judgment is therefore affirmed.

We concur: Sprague, J.; Rhodes, C. J.; Crockett, J.; Wallace, J.

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## Estate of BEZER SIMMONS, Deceased.

No. 2501; July 10, 1871.

**Public Administrator—Compensation.—When a Next of Kin Appears and Takes an Estate** out of the hands of the public administrator, the latter is to receive compensation as in any other case where an administrator has been removed and another appointed after a partial administration of an estate.

APPEAL from Probate Court, San Francisco County.

B. S. Brooks for appellant; Bartlett & Pratt for respondent.

See Estate of Simmons, 43 Cal. 543.

CROCKETT, J.—The value of the services of the counsel employed by the public administrator, in respect to the affairs and management of the estate, and whether the employment of counsel was necessary or proper, under the circumstances, were matters of proof in the court below. The probate court heard the testimony, passed upon these points and fixed the compensation. But the evidence on which this ruling was based is not brought up on this appeal; and yet we are asked to reverse the order, on the ground that the employment of counsel was unnecessary, and if necessary, that the compensation allowed is excessive. It is obvious that we cannot review the action of the probate court in these points, in the absence of the testimony. We cannot judicially know that it was unnecessary to employ counsel or that the amount allowed is too large. The same remark applies to the value of the services rendered by the administrator. Without having

the evidence before us, it is impossible for us to decide upon the reasonable value of his services.

But the appellant claims that the administrator is entitled to no compensation, as no money or property of the estate came into his actual possession. If this proposition be sound, an administrator who expends his time and labor in an honest and vigorous effort to obtain possession of the estate, and whose letters, without any fault of his, are revoked when he is on the eve of acquiring the possession of the property, would be entitled to no compensation whatever. This is the construction placed by counsel on section 314 of the probate act, which is in the following words: "The fees of public administrators shall be four per cent upon the amount of the estates administered by them, which percentage shall be the only compensation allowed for their services." In this case the court allowed the public administrator three per cent on the appraised value of the estate, though none of it had been reduced into his actual possession. It would be a somewhat too rigid construction of this section to hold that when the administration of the estate is taken out of the hands of the public administrator by the next of kin, after valuable services had been rendered by the former, he should receive no compensation whatever. The more reasonable rule is that established in Ord v. Little, 3 Cal. 287, in which it is decided that when an administrator has been removed and another appointed, after the estate has been partially administered, the aggregate amount of commissions on the whole estate shall be equitably apportioned between the outgoing and incoming administrator. This was the course pursued by the probate court in the present case, and, I think, correctly. Whether the apportionment was justly made, it is impossible for us to determine, in the absence of the evidence; and all the presumptions are in favor of the action of the court below. Nor have we the necessary data before us to enable us to decide whether the public administrator was guilty of negligence in the performance of his duties. At the hearing very substantial reasons may have been assigned on the proofs why he had not instituted actions for the recovery of the Sacramento property. The fact that he had no funds of the estate with which to defray the expenses of the litigation was of itself a forcible, if not a wholly satisfactory, excuse for

the delay. The creditors and heirs at law could not reasonably have demanded that the public administrator should advance his own funds for the recovery and preservation of the property. If the heirs at law to a valuable estate, which is held adversely, pay no attention to it and provide no funds for its recovery, they should not be heard to complain that the administrator has omitted to undertake the litigation at his own cost.

Judgment and order affirmed.

We concur: Sprague, J.; Wallace, J.; Temple, J.; Rhodes, C. J.

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L. HUGHES, Appellant, v. D. DESMOND et al., Respondents.

No. 2245; July 11, 1871.

**Appeal—Sufficiency of Evidence.—A Finding of the Trial Court will not be disturbed if supported by evidence deemed sufficient, even if the reviewing court regard the supporting evidence as not very satisfactory.**

Beatty & Denson for appellant; A. Comte, Jr., for respondents.

CROCKETT, J.—The contest in this case relates to a piece of mining ground situate on the public domain; and a judgment having been entered for the defendants, the plaintiff appeals, as well from the judgment as from an order denying his motion for a new trial. The court finds that in the year 1857, Haney, Atkinson & Co., through whom the plaintiff deraigns title, were in the occupation, for mining purposes, of a certain parcel of mining ground; and Donovan and others under whom the defendents claim, were also in possession of an adjoining mining claim; that in that year, the said claimants and occupants of these two contiguous *claims*, by mutual agreement, established a division line *between* them; that by the location of said line, so agreed upon, the premises in controversy in this action were included within the claim of Donovan and others, the predecessors of the

defendants. This finding was fully warranted by the testimony, and is conclusive of the rights of the parties, unless the plaintiff has shown some other and better title than that derived from Haney, Atkinson & Co. This he seeks to do, on the alleged ground that for more than five years next preceding his ouster by the defendants he had the actual, adverse possession of the premises in dispute; and he claims that, under the statute of limitations, his possession had ripened into a perfect title, as against the defendants, prior to the ouster. But the court finds the fact against him on this point; and his counsel, in order to escape the effect of this finding, attacks it on the ground that it is wholly unsupported by any evidence in the cause. But whilst the evidence is not very satisfactory, as to which of the parties had the actual possession of these premises, during the five years immediately preceding the ouster, there is clearly enough to support the finding, under the well-known practice of this court, which refuses to disturb a finding if there is any substantial conflict in the evidence.

Judgment affirmed.

We concur: Sprague, J.; Temple, J.; Rhodes, C. J.; Wallace, J.

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PEOPLE, Respondent, v. WM. SNELLIE, Appellant.

No. 2959; September 16, 1871.

**Witness—Impeachment.—A Witness Should not be Subjected to Public Insult** simply to gratify the spleen of the opposing party in the case, or his attorney, who may be injured by his evidence, or merely to depreciate him before the jury; and compulsion upon a witness to respond to questions material only as affecting his character should be exercised with due regard to this principle.

**Witness—Impeachment.—While Evidence Other Than That of the Witness Himself,** offered to impeach him, must be confined to evidence of general reputation, he may be asked as to collateral facts affecting his standing and having some bearing on his credibility.

**Witness—Impeachment.—While It is Proper to Prove Independent Collateral Facts** in order to place the character of a witness prop-

erly before the jury, such facts must be established by the best evidence; parol evidence will not be admissible when it appears that better evidence can be had.

APPEAL from Twelfth Judicial District, San Francisco County.

Attorney General for respondent; G. Y. Tyler for appellant.

TEMPLE, J.—The defendant was tried and convicted upon an indictment for grand larceny. On the trial he testified in his own behalf, and on his cross-examination stated that he had been in jail on this charge for five months. He was then asked if this was the only charge for which he had been put in jail. The question was objected to, but the objection having been overruled, witness said he had been arrested for assault and battery. He was then asked if he had been arrested for larceny. Objection being made was overruled, the judge remarking at the time: "He is not bound to answer it, but the question whether he has ever been arrested and confined on such a charge may be asked." Witness then answered the question in the affirmative. It is claimed that these rulings are erroneous under the doctrine of People v. Reinhart, 39 Cal. 449.

On the other side, it is contended that the examination was proper, as tending to show the degree of credibility to which the witness was entitled, to exhibit his true character and standing before the jury, and that the evidence did not tend to prove the contents of a record by parol, but only to show that he had been accused of and arrested for an offense.

There is no more vexed question in the law of evidence than as to the latitude which should be allowed on cross-examination to bring before the court and jury the exact character of the witness upon whose testimony they must depend. The arguments in favor of and against allowing compulsory examination upon matters, which are material only as affecting the character of the witness, have often been stated with great force. It is certainly desirable that a witness should not be subject to public insult simply to gratify the feelings of a party or his attorney, who may be injured by his evidence, nor should he be permitted to be insulted merely to depreciate

him in the estimation of the jury. He ought not to be aggravated merely to test his power of self-control, or to throw him from his ground, nor ought the veil be lifted from transactions long past which do not throw light upon the present character of the witness, nor ought inquiries to be allowed which, while they tend to degrade, throw no light upon the credibility of the witness. The cases upon the subject are not very satisfactory, but in practice, at all events, it is settled that while other evidence offered to impeach a witness must be confined to evidence of general reputation, the witness himself may be asked as to collateral acts affecting his standing and having some bearing upon his credibility. Nor will he be privileged from answering simply because the answer will tend to depreciate him in the estimation of the community. The evidence must be such as would directly show his infamy. The authorities on the subject are compiled in Starkie on Evidence, p. 208; 1 Greenl., sec. 454 et seq.; 2 Phill. Ev. 421.

But while it is proper to prove independent collateral acts, in order to place the character of the witness properly before the jury, such facts must be established by the best evidence, and parol evidence will not be admissible when it appears that better evidence can be had. Thus a person might be asked if he had not been discharged from a situation on suspicion of theft, but he could not be asked if he had been convicted of larceny, for this implies better evidence. In this case the question was whether he had not been imprisoned on a charge of larceny. It is true an arrest may, under extraordinary circumstances, be made when no written charge has been made and no warrant issued. In such case, however, the charge is required to be made in writing with all convenient haste, and the case is exceptional. The presumption, I think, is, that when a person is put in jail upon a criminal charge, the accusation is in writing, which in such case would constitute the best evidence of the fact. One reason given why it would not be safe to allow the witness to state whether he has been convicted is because he may be mistaken as to the nature of the conviction. The same reason applies with equal force to the case at bar, and it is equally within the rule that the best evidence the case admits of should be produced.

Judgment reversed and cause remanded for a new trial.

We concur: Sprague, J.; Rhodes, C. J.

CROCKETT, J.—I dissent. There is no presumption that necessarily, or even prima facie, an arrest for larceny was founded on a written accusation. On the contrary, in numerous instances, the arrest is lawfully made, without a warrant or written accusation, when the offender is taken in the very act of committing the crime. But if the law expressly required a written accusation as preliminary to the arrest, nevertheless the accused may, in fact, have been arrested on a verbal accusation only; and for all the purposes for which the witness in this case was interrogated on that subject, the fact of the arrest, under such circumstances, would have been as damaging to him as though the forms of law had been strictly complied with in making the arrest. And even though it had been conceded that the accusation was in writing, I am not prepared to say that the court erred in admitting the testimony. In People v. Reinhart, 39 Cal. 449, the attempt was made to prove by parol that the party had been convicted of a felony. We held the proof to be incompetent, on the ground that the record was the best evidence of the conviction. But an arrest is an act in pais, and may be proved by parol; and my impression is that the cause of the arrest, to wit, that the party was suspected of having committed a particular offense, may be shown in the same method, even though there was a written accusation. The sole object of such evidence is to show that the witness had labored under so strong a suspicion of having committed a particular offense as to induce his arrest; and I am inclined to think this fact may be shown by parol, even though the accusation was reduced to writing. It will seriously obstruct the administration of justice in criminal cases if such evidence be inadmissible. When the accused becomes a witness on his own behalf, it may frequently become important to show, as affecting his credibility, that on previous occasions, and perhaps in remote localities, or in other states and possibly in a foreign country, he had been arrested on criminal charges. If the fact cannot be shown by parol, it will be practically impossible to prove it at all in numerous cases. My impression is that such evidence is admissible, even though the accusation be in writing; but it is unnecessary to decide the point in this case.

WALLACE, J.—The latitude which should be allowed on cross-examination (upon which the opinion of the majority of the court proceeds) is a question which I do not understand to be presented in the record before us. The case is here upon a bill of exceptions—intended, in the language of the statute, "to present the questions of law upon which the exceptions were taken"—and it sets forth that the prisoner had been examined in chief as a witness in his own behalf, and that upon his cross-examination by the district attorney that officer made certain inquiries of him to which his counsel objected because the evidence sought to be elicited thereby was "not the best evidence in degree." Had it been the intention to question the mere limit to which a cross-examination might be properly carried or to claim that in point of law that limit had been exceeded, the bill of exceptions would doubtless have so stated, and with the requisite precisions. So, had it been the purpose of the prisoner to challenge the right of the district attorney to cross-examine him at all, the bill of exceptions would have so set it forth. But when, as here, we are distinctly informed by the record that the objection upon which the prisoner relies is that the evidence itself is "not the best evidence in degree," we are pointed to a recognized rule governing the production of evidence in courts of justice and, ordinarily, requiring it to be the best in degree in the power of the party offering it, and our judgment must be confined to a consideration of that rule and its application to the facts appearing.

And I am of opinion that the rule referred to was not infringed in permitting the prisoner to be cross-examined in the manner complained of.

The object of the district attorney was to prove the fact that the prisoner had been arrested upon a charge of larceny—this was a fact, if at all, in pais; it was an act done, if done at all, irrespective of the existence of any record authorizing, or supposed to authorize, it to be done; as a mere fact occurring, it would, therefore, still exist though it had been conceded that no writing had ever existed to which it bore any relation or had any possible reference. The distinction in this respect between the proof of such a fact upon the one hand and the proof of the fact of conviction of an offense

upon the other hand is most obvious—the latter is necessarily matter of record; the conviction is the record itself, and it cannot be seen or understood except as it is found there. The cases in this court (People v. Reinhart, 39 Cal. 449; People v. McDonald, 39 Cal. 697) relied upon by the prisoner's counsel themselves illustrate the distinction indicated. I therefore dissent from the prevailing opinion and from the judgment of reversal, and am of opinion that the judgment of the court below should be affirmed.

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## GEORGE CLAUSS, Respondent, v. EUGENE FROMENT, Appellant.

No. 2834; September 27, 1871.

**Bills and Notes—Demand.**—In an Action on a Promissory Note payable on demand, no prior demand need be averred or proved.

**Partnership—Action on Note—Pleading.**—In an action by the payees of a promissory note drawn in favor of a firm, it is not indispensable that the complaint expressly set up the partnership if it contains a copy of the note and avers that the defendant thereby "undertook and promised to pay these plaintiffs," that the note is long past due and "payable from defendants to them"; particularly if the answer fails to deny these averments.

**Names.—It is Immaterial by What Name Persons are Described** in a note, if the note was made, executed and delivered to them, and they are in fact the persons intended to be designated as payees.

APPEAL from Third Judicial District, Santa Clara County.

Geo. M. Yoell for respondent; D. M. Delmas for appellant.

CROCKETT, J.—The plaintiffs, George Clauss and Joseph Ban, sue upon a promissory note, payable on demand, to "G. Clauss & Co."; and a copy of the note is set out in the complaint. The answer contains only a denial that the defendant was ever requested or had ever refused to pay the note, or that payment had ever been demanded. The court rendered

judgment for the plaintiffs on the pleadings, and the defendant appeals on the judgment-roll alone. Only two questions are discussed by counsel, viz.: 1st, whether it was incumbent on the plaintiffs to aver and prove a demand of payment before suit brought; 2d, whether the complaint contains a sufficient, or any, averment that the plaintiffs compose the firm of "G. Clauss & Co." It is conceded by counsel that it is established by the weight of authority that, in an action on a promissory note payable on demand, no prior demand need be averred or proved. This proposition is now too firmly settled by a long line of authorities to be open to controversy. The first point made by the defendant is therefore not tenable. The complaint does not contain an express averment that the plaintiffs compose the firm of "G. Clauss & Co."; but it alleges that the defendant "made, executed and delivered to these plaintiffs his certain promissory note, in words and figures following." Then follows a copy of the note, coupled with an averment that thereby "the said defendant undertook and promised to pay to these plaintiffs or their order on demand," etc. Subsequently is an averment that "said note is long past due and payable from defendant to them." These averments are not denied by the answer, and I think they constitute a sufficient allegation that the plaintiffs constitute the firm to which the note is payable. It is immaterial by what name the plaintiffs are described in the note, if it was made, executed and delivered to them, and if they are in fact the persons intended to be designated as payees. The complaint sufficiently shows these facts, and that the plaintiffs are the persons designated in the note by the description of "G. Clauss & Co."

Judgment affirmed.

We concur: Rhodes, C. J.; Wallace, J.; Temple, J.; Sprague, J.

JOHN HOUCK, Appellant, v. JAMES CAROLAN, Respondent.

No. 2844; October 23, 1871.

**Pleading—Defective Pleadings—Procedure.**—When a defense apparently good in substance is defectively pleaded, the appropriate remedy is by demurrer; a motion for judgment on the pleadings is the appropriate remedy when the pleading is fatally defective in substance.

**Evidence.—Conversation Occurring Five or Six Years Before the Trial** and overheard by witnesses not interested in the subject are liable to have been misunderstood and inaccurately remembered. Such evidence is not to be depended upon.

**Evidence—Credibility of Witnesses.—The Trial Court,** having not only heard the witnesses testify but observed their manner while doing so, which is the safest criterion of credibility, should not have its functions usurped by the reviewing court.

**Evidence.—The Admission Below of Hearsay Testimony** cannot justify a reversal, where the admission could have in no way injured the party appealing.

**Evidence—Cumulative Testimony.—The Refusal to Permit the Introduction** of testimony on a point already established to the full by other testimony, and when there was no evidence at all to the contrary, is not error.

**Pleading—Failure of One Defendant to Verify Answer.**—That there is matter in the answer that vitally calls for verification, and the answer is not verified by some defendant concerned particularly in that matter, is no cause for judgment on the pleadings, if the answer would be good even were that matter stricken out, the defendant who did verify being conversant with the remaining matter.

APPEAL from Sixth Judicial District, Sacramento County.

Heard & McConnell and Beatty & Denson for appellant; Coffroth & Spaulding for respondent.

CROCKETT, J.—The plaintiff's motion for judgment on the pleadings was properly denied. The answer is, perhaps, not as full and explicit as it should have been, in respect to the consideration paid by Carolan for the property, and may have been demurrable on this ground; but it is, at most, only a defective plea of a good defense, to be taken advantage of

by demurrer, which would have afforded an opportunity for amendment if the demurrer had been sustained. When a defense, apparently good in substance, is defectively pleaded, the appropriate remedy is by demurrer, and not by a motion for judgment on the pleadings. The latter is the appropriate remedy when the pleading is fatally defective in substance.

Nor did the failure of the defendants, Swift and Huntoon, to verify the answer, furnish any reason why the motion should have prevailed as to them. If Carolan was a purchaser in good faith, for a valuable consideration, without notice of the fraudulent intent of Berger, he acquired a valid title which has vested in the other defendants; and he was certainly more competent than they to verify that portion of the defense which rested peculiarly within his own knowledge. The most that could in any event be claimed is that so much of the answer as sets up that Swift and the Huntoons were purchasers for value, in good faith, without notice, should be disregarded, because not verified by them. But if this portion of the answer was stricken out, they would still have a good defense, if the other facts alleged are true; and as to those, Carolan, who had a personal knowledge of them, was certainly competent to verify them. The motion for judgment on the pleadings was therefore properly denied as to all the defendants.

One of the grounds of the motion for new trial was that the evidence did not justify the decision and judgment of the court; and we are urged to reverse the judgment on this ground. But on the question of notice to Carolan of the fraudulent intent of Berger, which is the most material question in the case, there is a direct conflict in the evidence. This is not denied by counsel; but they insist that the weight of evidence is so overwhelmingly in favor of the plaintiff as to require us to depart from our general practice in refusing to disturb the judgment on this ground when there is a substantial contract in the evidence. But if we were inclined, in any case, to depart from a practice now so firmly established, we would not be justified in doing it in this case. The testimony for the plaintiff, on the question of notice, is not of a very satisfactory character, and consists chiefly of the proof, by several witnesses, of conversations alleged to have occurred on separate occasions between Berger and Carolan.

Conversations occurring five or six years before the trial and overheard by witnesses, to whom they were not addressed, and who had no interest in the subject matter of them, are very liable to have been misunderstood, and to be inaccurately remembered. In addition to this, some of these witnesses did not present themselves in the most favorable light before the court; and it was the peculiar province of the court below to decide upon their credibility. On the other hand, portions of the testimony of Carolan appear to be in some degree improbable. The statement that he visited San Francisco almost every month for a year, without calling upon his father in law, with whom he was on friendly terms, and without even inquiring where his place of business was, or knowing that he was engaged in any business, would seem to be rather improbable. But the court which tried the cause had the opportunity to observe the manner and demeanor of these witnesses on the stand; and this is generally one of the safest criterions by which to test the credibility of a witness. Under these circumstances, we would not be justified in usurping the functions of a trial court, by pronouncing on the relative degrees of credence to which the witnesses were entitled; even though we were inclined, as we are not, to depart in any case from our usual practice.

At the trial, one Koster, a witness for the plaintiff, on his cross-examination, in giving a history of himself, stated that he had an office at the store of Taylor & Cranna, Front street, San Francisco, and referred to the members of that firm, as persons who knew him. The defendants, in rebuttal, called one Marshall as a witness, and proposed to prove by him the statements of Taylor & Cranna, to the effect that Koster had no office at their store. The plaintiff objected to the testimony as hearsay; but the court admitted it and the plaintiff excepted. That this testimony was mere hearsay, and therefore inadmissible, is incontrovertible. But it worked no injury to the plaintiff. The sole object of the testimony was to impeach the credibility of Koster, by showing that he had made a false statement, in respect to his having an office at Taylor & Cranna's store; and the witness Marshall testified that whilst Cranna stated that Koster had no office at their store, he also stated at the same time that Koster, several months before, had brought him a letter of introduc-

tion from his partner in New York, in which he was requested to aid Koster "in getting an office for him, and Mr. Cranna said that since that time Koster had stopped there off and on." He repeats this several times on his cross-examination, and states that Cranna said nothing disrespectful of Koster; and only that he knew nothing of him, until he brought the letter of introduction.

The whole of this testimony, taken together, tended in no degree to impeach Koster. It may not have been very accurate for him to say that he had his office at Taylor and Cranna's; but when it is considered that he brought a letter of introduction to Cranna, requesting him to aid Koster in obtaining an office, and that from that time Koster "was off and on" there, and that Cranna said nothing to his prejudice, it is inconceivable that the mere inaccuracy of his expression, in saying that he had an office at this store, could have been held to impeach his credibility in any degree whatsoever.

If the court erred in refusing to permit the plaintiff to testify that he was acquitted of the charge of grand larceny, it was an error which could have done him no possible injury, inasmuch as the fact had already been fully established by other testimony, and there was no evidence whatever to the contrary.

It is unnecessary to notice the other alleged errors of the court in the admission and exclusion of evidence, further than to say that I discover no error in these rulings.

Judgment affirmed.

We concur: Rhodes, C. J.; Wallace, J.; Temple, J.

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SAMUEL H. CHARLETON, Respondent, v. E. P. REED, Appellant.

No. 2823; November 8, 1871.

**Evidence—Admissions in Answer.—A Plaintiff Need not Prove at the trial matter admitted in the answer.**

**Appeal—Conflicting Evidence.—The Finding of the Trial Court on a point as to which the evidence was directly and substantially conflicting should be allowed to stand.**

**Costs.—In Modifying the Trial Court's Judgment,** erroneous merely through an incorrect and excessive computation of interest, the respondent is made to pay the costs of appeal.

APPEAL from Third Judicial District, Santa Clara County.

Badley & Rankin and Moore, Lania & Silent for respondent; S. O. Houghton for appellant.

SPRAGUE, J.—The judgment in this case is not in conformity with the verdict, which evidently is the result of erroneous computation of interest on two thousand dollars from the thirteenth day of November, 1866, to the twenty-ninth day of September, 1870, the day of the rendition of the verdict and the entry of judgment thereon. The proper judgment upon the verdict would be two thousand dollars with seven per cent per annum interest thereon from the thirteenth day of November, 1866, to the twenty-ninth day of September, 1870, three years, ten months and fifteen days, amounting to two thousand five hundred forty-two dollars and fifty cents, instead of two thousand six hundred and seventy-three dollars and twelve cents.

I discover no error in the instructions given by the court to the jury, or in refusing to give the instructions asked by defendant.

It was not necessary for plaintiff to prove that the security given by Bennett for the repayment of the two thousand dollars with the interest stipulated, was at the time inadequate, as the answer admits the fact; and upon the question whether the money was loaned by plaintiff against the advice and independent of the action of his agent, Reed, the evidence is directly and substantially conflicting, and of a character not to justify this court in setting aside the order of the court denying a new trial on this ground.

Cause remanded with directions to the court below to modify the judgment in accordance with this opinion, at the costs of respondent.

We concur: Temple, J.; Rhodes, C. J.; Crockett, J.

OPINION ON REHEARING.

January 25, 1872.

SPRAGUE, C. J.—In the former opinion in this case the statute of April 4, 1870, amendatory of the acts of March 13, 1850, and March 30, 1868, to regulate the interest on money, as also the case of White v. Lyons, decided at the same term, were overlooked.

In view of the first-named statute of April 4, 1870, and the case of White v. Lyons, October Term, 1871, I discover no error in the record prejudicial to the rights of appellant.

Judgment affirmed.

We concur: Rhodes, J.; Crockett, J.

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PEOPLE, Respondent, v. FRANK ANDERSON, Appellant.

No. 2655; November 17, 1871.

**Trial—Reading Law Reports to Jury.—There is No Error in** calling the attention of counsel in the jury's presence to the impropriety of reading law reports to the jury.

**Self-defense.—An Instruction may be Wrong in Omitting to Inform** the jury under what circumstances an apparent necessity for self-defense would have justified the defendant in the killing, but if this omission is so fully cured, in the instructions given at the defendant's instance, that the jury cannot possibly have been misled to the defendant's prejudice, the error is not a reversible one.

APPEAL from Sixth Judicial District, Sacramento County.

Attorney General for respondent; Haymond & Jones for appellant.

See People v. Anderson, 44 Cal. 65.

CROCKETT, J.—In summing up the case, the counsel for the defendant, by way of illustrating his argument, read to the jury and commented on several adjudged cases, and com-

pared the facts of those cases with those of the case on trial. At the close of the argument the court, in the presence of the jury, stated to the counsel that reading law to the jury by counsel was improper and calculated to mislead them, and would not have been permitted if it had been objected to; that the written instructions of the court were the only guide for the jury in this case on questions of law. This observation of the court is assigned as error on appeal. That it is the duty of the jury in a criminal case to take the law from the court is too well settled in this state to admit of discussion; and the court was perfectly correct in stating that the practice of reading law to the jury by counsel is improper, and calculated to mislead and confuse them. There was no error in calling the attention of counsel, in the presence of the jury, to the impropriety of this course.

There is but one other ground of error relied upon, to wit, that the eighth instruction given at the instance of the prosecution was erroneous. This instruction is certainly objectionable in omitting to inform the jury under what circumstances an apparent necessity for self-defense would have justified the defendant in killing the deceased. But this omission was so fully cured in the instructions given on the request of the defendant, that it is impossible the jury could have been misled to the prejudice of the defense.

Judgment affirmed.

We concur: Rhodes, C. J.; Wallace, J.

I concur in the judgment: Sprague, J.

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## DAVID UMBARGER, Respondent, v. PEDRO CHABOYA, Appellant.

No. 2691; November 27, 1871.

**Ejectment.—A Valid Confirmation by Decree Concludes All Persons** except such as claim under adverse grants, as defined by section 15 of the act of March 3, 1851.

**Boundary.—Parol Evidence Should not be Received to Prove a** boundary line when the best evidence in point is procurable in the form of an express grant of the land.

APPEAL from Third Judicial District, Santa Clara County.

Thomas Bodley & Wm. Matthews for respondent; S. O. Houghton for appellant.

See Umbarger v. Chaboya, post, p. 765, 49 Cal. 525.

CROCKETT, J.—The demanded premises are included within the concession alleged to have been made by the Mexican authorities to Chaboya; and also within the five hundred acre lot, subsequently granted to him by Dimmick, alcalde of San Jose. It is admitted on all sides that the last-named grant was void, as it clearly was: Redding v. White, 27 Cal. 284. The plaintiffs, who deraign title under Chaboya, rely solely on the concession and on the final decree of the courts of the United States, confirming Chaboya's title as to so much of the land included in the concession as is embraced within the five hundred acre grant by the alcalde.

But the decree of confirmation is assailed on the ground that the United States district court had no jurisdiction to render it. This proposition is founded on the assumption that the court did not undertake to confirm the title under the concession, but only under the Dimmick grant; and it is claimed that it had no jurisdiction to confirm the last-named grant, because: 1st. The special act of Congress did not authorize that grant to be presented for confirmation, and Chaboya did not in fact present it in his petition; 2d. The act of March 3, 1851, required all titles, claimed under a pueblo, to be presented in the name of the pueblo, and not in the name of the claimant; and it is said that the court, for this reason, had no jurisdiction to confirm the Dimmick grant, even though Chaboya had presented his petition for that purpose. It becomes material, therefore, to ascertain whether it was the concession or the Dimmick grant which was confirmed. It appears from the record of the proceedings in the United States district court that the only claim which Chaboya asked to have confirmed, in virtue of the special act of Congress, was that which he asserted under the concession. No reference was made in his petition to the Dimmick grant, nor did he put that grant in evidence, or

offer any proofs in support of it. On the contrary, the Dimmick grant was put in evidence by the district attorney on behalf of the government; and evidence was also introduced tending to show that from the date of the grant Chaboya limited his possession and claim to the five hundred acres included in the grant. The ground taken by the district attorney evidently was, that when the five hundred acres were awarded to Chaboya by the alcalde, he had consented to reduce his claim under the concession from two leagues to five hundred acres; and had thereafter abandoned all claim to the residue, and limited his possession to the tract awarded by the alcalde. The Dimmick grant was put in evidence, not for the purpose of showing title in Chaboya, but as evidence that he had abandoned all claim to the residue, and had consented to a reduction of his limits to that extent. It may also, possibly, have been offered to show that the fact of his accepting the five hundred acre grant was evidence tending to prove that no valid concession had been made to him. But there is nothing in the record to indicate that Chaboya relied upon the Dimmick grant as a muniment of the title, which he sought to have confirmed. Nor did the court so treat it in the decree of confirmation. On the contrary, the only claim adjudicated was that asserted under the concession; and the court rejected the whole claim, "except for a tract of five hundred acres of land, being the same five hundred acres allotted to the said Pedro Chaboya by the authorities of San Jose and accepted by him, which said tract of five hundred acres is hereby confirmed to the said Pedro Chaboya." This tract was confirmed to him, not because the alcalde's grant conferred any title, but because, on accepting that grant, Chaboya had relinquished all claim to the residue of the tract included in the concession, and the grant was referred to in the decree only for the purpose of identifying the particular five hundred acres, the title to which was confirmed. But the decree was founded on the concession and not on the Dimmick grant, which had no other effect than to limit the quantity of land to which Chaboya was entitled under the concession to the five hundred acres which he had consented to accept in lieu of the original quantity of two leagues, to which he would otherwise have been entitled. It is obvious that the district and supreme courts of the United

States decided the cause on this theory, and had no intention whatever to confirm the claim in virtue of the Dimmick grant.

The decree of confirmation is therefore valid, and is conclusive upon all persons whomsoever, unless it be third persons claiming under adverse grants as defined in section 15 of the act of March 3, 1851. The defendants deraign title under the city of San Jose, and claim to be such third persons. There appears to have been confirmed to the city of San Jose a large body of land, within certain exterior limits which include the premises in controversy. But on the face of the decree of confirmation, there is excepted from its operation the lands included within certain specified grants, "and also such other parcels of land as have by grants from lawful authority vested in private proprietorship or have been finally confirmed to parties claiming under said grants by the tribunals of the United States, or shall hereafter be finally confirmed to parties claiming thereunder by said tribunals, in proceedings now pending therein for that purpose." The claim of Chaboya comes fully within the letter and spirit of the exception; and the five hundred acre tract confirmed to him was not confirmed to the city. There is no conflict between the confirmation to the city and that to Chaboya; and both decrees having become final, they are conclusive as between these parties.

There was therefore no error in excluding the decree of confirmation to the city, when offered in evidence by the defendants. If admitted, it would not have benefited them. Nor did the court err in excluding parol evidence tending to show the admissions of Antonio Chaboya, to the effect that the western line of his rancho did not extend to the Coyote creek. The best evidence of the true location of that line were the deseño, grant, and final location under the decree of confirmation. These showed the creek to be the western boundary of the ranch, and it was not competent to contradict them by parol. Several other rulings, and a portion of the charge of the court to the jury are assigned as error; but I discover no error in them, and deem it unnecessary to notice them more particularly.

Judgment affirmed.

We concur: Wallace, J.; Temple, J.

WARREN COTTLE, Respondent, v. JOHN P. HENNING, Appellant.

No. 2692; November 28, 1871.

**Adverse Possession—Appeal.—A Finding as to the Length of an** adverse possession, if made up by the court below on evidence substantially conflicting, is not to be disturbed on appeal.

**Adverse Possession—Purchase by Occupant.—It is possible for** a person in possession adversely to continue to hold adversely to an asserted title notwithstanding he has, while so in possession, purchased or attempted to purchase an interest in such title; but the fact of such purchase is admissible in evidence against him.

APPEAL from Third Judicial District, Santa Clara County.

S. O. Houghton for respondent; Moore & Laine, for appellant.

WALLACE, J.—It is true that on the eighteenth day of April, 1863, the title of the plaintiff had not been finally confirmed, within the intent of section 7 of that act—that is, the patent had not been issued by the government of the United States, nor the official survey of the rancho finally determined. Even if we are to hold that in such a case the bar of the statute became applicable in April, 1868, and that the action would, therefore, fail, because not commenced until December of that year, we could only do so upon the assumption that the possession of the defendant had been adverse during all that period of time; but the court below found as a fact that the possession of the defendant was not adverse in its character. In view of this fact, the time at which the plaintiff's title became finally confirmed is wholly immaterial. One of the grounds of the motion for a new trial is that the evidence does not support this finding. Upon the trial the character of the defendant's possession was brought prominently in controversy. The defendant was examined and cross-examined upon that point, as were other witnesses. The defendant also proved that he first entered under the deed from Williams de-

rived under a title on asserted title other and different from the title under which the plaintiff claims.

The plaintiff, upon the other hand, proved that the defendant, subsequently, and while in possession, had purchased an undivided interest in the premises from one Montgomery, then a tenant in common with the plaintiff, claiming under the same title as that held by the plaintiff, and that the defendant, when called upon by the assessor for a statement of his property, gave in certain lands as his own, but omitted the premises in controversy, though he was then in the possession thereof; and it was not pretended that this omission was a mistake or oversight upon his part. The evidence was thus, if considered in the light most favorable to the defendant, substantially conflicting upon the point of adverse possession by the defendant. We do not understand the court below to have determined that the purchase subsequently made from Montgomery by the defendant operated per se to render the possession of the defendant thereafter no longer adverse. Such a determination would have been erroneous under the ruling made here in Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205, where it was distinctly held that a party already in possession adversely might continue to hold adversely to an asserted title, notwithstanding he had, while so in possession adversely, purchased or attempted to purchase an interest in such title.

But it cannot be doubted that it would be competent to prove the fact that a purchase was so made as evidence tending to show that thereafter the possession was held by the defendant in subordination to the title in which he had so acquired an interest.

The judgment and order must therefore be affirmed, and it is so ordered.

We concur: Rhodes, C. J.; Crockett, J.; Temple, J.; Sprague, J.

DUANE BALLARD, Appellant, v. JESSE D. CARR, Respondent.

No. 2780; November 29, 1871.

**Attorney—Duty in Earning Contingent Fee.**—An attorney to whom a cause is intrusted must, in order to become entitled to benefits promised him by his client in the event of success in his efforts, watch the progress of the action and keep himself in a position to perform any service which the exigency of the cause may demand.

**Specific Performance—Discretion.—A Decree for Specific Performance** is always more or less within the discretion of the court. It may either be refused, it being deemed inequitable or against good conscience to enforce the contract, or it may be granted on such terms and subject to such conditions as may be just.

**Specific Performance—Amendment of Answer.**—In a suit for the specific performance of a contract between an attorney and his client whereby the former was to have land conveyed him by the latter in return for future services successfully performed, the defendant should be allowed to amend his answer so as to have it show omissions by the attorney putting the defendant to expense, the reimbursing him for which ought to be attached as a condition to any decree the plaintiff might be given.

**Attorney—Suit for Services Under Contract Contra Bonos Mores.**—In an action on an express contract for an attorney's compensation, the client is estopped to defend on the ground that the services contemplated by the contract were contra bonos mores.

APPEAL from Fifteenth Judicial District, San Francisco County.

H. T. Crane for appellant; W. H. Patterson for respondent.

See Ballard v. Carr, 48 Cal. 74.

CROCKETT, J.—At the date of the contract between the defendant and Hartman a decree had been entered confirming the title of the claimant in the case of Larkin v. The United States, and a motion had been made by the United States district attorney to open the decree, on the ground that the pretended grant under which Larkin claimed was a forgery. This motion was pending and undecided when the defendant succeeded to Larkin's interest, and when the contract between

the defendant and Hartman was entered into. The substance of the contract was, that Hartman was retained as the attorney of the defendant, to procure an order or decree of the United States district court, "making the decree final in said court which has already been entered up in said case," "or to procure the dismissal of any appeal to the supreme court of the United States, that may be taken therein by the said United States." Hartman, on his part, agreed "to do and perform the services above mentioned and set forth"; in consideration of which the defendant agreed, "that so soon as the above services are performed," he would convey to Hartman two undivided leagues of the land. The motion to open the decree was denied, and the decree became final in the district court; and no appeal has been taken to the supreme court of the United States, though more than five years have elapsed from the date of the decree. This action is brought by the plaintiffs, as assignees of Hartman, to compel a specific performance of the contract for the conveyance of the two leagues of land. The defense is: 1st. That Hartman did not perform the service for which he stipulated, and did not procure the decree of the United States district court to be made final; but, on the contrary, neglected to give proper attention to the case, in consequence of which the defendant was compelled to employ other counsel at a great expense; 2d. That the contract is void for want of mutuality; 3d. That the pretended grant from the Mexican government was a forgery, which fact was known to Hartman when he entered into the contract; and that he entered into it with the intent "to conceal" from the government of the United States and its officials the fact that said grant was forged and simulated; and that the contract was therefore contra bonos mores and void.

Judgment was entered for the defendant and the plaintiffs appeal, both from the judgment and from the order denying their motion for a new trial.

I discover no material conflict in the evidence on any point in the cause. The facts appear to be, that the motion to open the decree was not brought on for hearing until October, 1863, on which occasion Hartman was present and argued the motion orally, and also filed a written brief. The matter was taken under advisement by the court, and Hartman

was soon after called to Washington on professional business, where he remained for some months. During his absence, in March, 1864, the court, of its own motion, ordered a reargument of the motion to open the decree and fixed the sixth day of the following June for the argument. On the 30th of April, the defendant wrote to Hartman at Washington, notifying him of these proceedings, and informing him that he had retained Mr. Patterson to argue the cause. Hartman did not return to California until after the day appointed for the argument, and Patterson argued the motion orally for the defendant, and also filed a written brief, for which service he was afterward paid by the defendant the sum of five hundred dollars. The court again took the motion under advisement; but did not decide it until August, 1865, when it was denied, and the decree became final. It further appears that after the reargument, and whilst the motion was under advisement, the defendant, in a letter to Hartman, who was still at Washington, requested him to procure a copy of a recent decision of the supreme court, which was supposed to have some bearing on the question, to be forwarded to the judge of the district court, and also to use his efforts to procure an order from the attorney general, directing a dismissal of the motion. Hartman procured a copy of the decision referred to and delivered it to the judge, before the motion was decided; and also endeavored, but without success, to procure an order from the attorney general, dismissing the motion. After the motion was denied, and there had been an official survey of the land, Hartman requested a conveyance of the two leagues; but the defendant declined to make the conveyance at that time; stating, as he testifies, that as he interpreted the contract, Hartman would not be entitled to the conveyance until the patent issued. These being the facts, it is clear that Hartman did not strictly and fully perform his duty as the attorney in the case. It was his duty as an attorney to watch the progress of the action and to keep himself in a position to perform any service which the exigency of the case might demand. His only omission, however, was his failure to be present at and to participate in the reargument of the motion. If he had participated in this argument, there could have been no pretense that he had not fully performed the contract on his part. It

will be observed, however, that the ultimate fact, on which his right to a conveyance of the two leagues was to depend, was the procuring of an order making the decree final, or the dismissal of the appeal, if one should be taken by the United States. There has been no appeal, and the decree has become final. To what extent the services rendered by Hartman contributed toward the result, it is impossible to ascertain. For aught that appears, the argument made by him on the first hearing of the motion may finally have prevailed, and induced the court to deny the motion; or possibly the decision of the supreme court, furnished by him after the argument, may materially have influenced the court. The result which he was employed to secure was obtained, to wit, the denial of the motion, whereby the decree became final; but whether this result was due solely to his efforts, or to the conjoint efforts of himself and Patterson, or to those of Patterson alone, it is impossible, in the nature of the case, to determine. But it would have been equally so if Hartman had been present and participated in the reargument. The defendant had the right to employ additional counsel, even though Hartman had been present, using all proper effort to procure a denial of the motion. In that event it would have been fruitless to inquire to what extent the mind of the judge was influenced by the argument of Hartman, and to what extent by that of Patterson. Hartman's rights could not have been made to depend upon any such subtle inquiry, or nice analysis of the mental operation of the judge who decided the motion. But if such an inquiry would not have been permissible, in case Hartman had participated in the reargument, it is equally inadmissible as the case stands, Hartman having made an oral argument and filed a brief on the motion, and Patterson having also made an argument and filed a brief on the same side, and one of the propositions urged by Patterson being the same before presented by Hartman, it would be difficult, I apprehend, even for the judge who decided the motion to analyze so nicely the operations of his own mind as to determine to what extent he was influenced by the argument of the one or the other. But if such an inquiry had been permissible, it was not attempted in this case. There was no effort to prove that, except for Patterson's argument, the motion would have been

decided otherwise than it was. The case, then, stands thus: Hartman stipulated to use his efforts as an attorney to procure a denial of the motion, on the result of which his right to a conveyance was to depend. He took the proper steps in that direction by making an oral argument and filing a brief; but under the belief that some further effort was necessary, the defendant, in Hartman's absence, retained another attorney, who also made an argument and filed a brief, and as the result of these briefs and arguments, the motion was denied; there being nothing, however, to show, or from which it can be inferred, that the result would not have been the same if the case had rested solely on the argument and brief of Hartman. We cannot assume that Hartman's efforts were ineffectual, and did not produce the desired result, unless that fact be affirmatively proved, and there was no such proof in the case. I am, therefore, of opinion that Hartman must be held to have performed the condition precedent, on the performance of which he was to become entitled to the conveyance.

But a decree for specific performance is always more or less within the discretion of the court; and it may either be refused if it be inequitable or against good conscience to enforce the contract, or it may be granted on such terms and subject to such conditions as may be just. If, therefore, Hartman, by any apparent neglect of the case during its progress, rendered it necessary for the defendant, as a prudent man, to employ other counsel to look after the case during Hartman's absence, justice demands that the latter should bear the necessary expense thus incurred, and that the defendant should have an equitable lien on the two leagues of land to secure his reimbursements. If the defendant shall deem it necessary to amend his answer, in order to present this point properly, he should be permitted to do so. But the amount paid to Patterson is not the criterion by which to determine the amount for which Hartman may be liable. He can only be held responsible for such sum as would have been sufficient to secure the services of a skillful and competent attorney to perform such services as he ought to have performed, but omitted to perform. If the defendant has paid Patterson more than a reasonable sum, Hartman is not liable for the excess.

The point that the contract cannot be enforced for lack of mutuality is untenable. The case in this respect comes fully within the principle decided in Hall v. Center [40 Cal. 63], at the October term, 1870.

The only remaining question is whether the contract is contra bonos mores and therefore void. If the defendant was in a position to raise this question, and if it had appeared that Hartman engaged to prosecute in the courts of the United States the defendant's claim to the land, with knowledge that the pretended grant was a forgery, and with the intent to conceal that fact from the court and the law officers of the government, it is clear that a court of equity would not lend its aid to enforce a contract so full of turpitude. But the defendant is estopped to aver that the grant under which he holds the land was a forgery. The final decree of confirmation is an adjudication that the grant was valid and genuine, and is conclusive of that fact, upon all persons whomsoever, in a collateral action, unless it be in respect to third persons holding under adverse grants, whose rights are preserved by the act of Congress of March 3, 1851. In a collateral action, even the government would not be permitted to go behind the decree of confirmation, for the purpose of showing that the grant was forged; and much less should the defendant, who is enjoying the fruits of the fraud, be allowed to do it. Of all persons, he is the least entitled to go behind his own final decree declaring the grant to be genuine, for the purpose of showing it to be fraudulent.

Judgment reversed and cause remanded for a new trial, in accordance with the principles announced in this opinion.

I concur: Sprague, J.

Wallace, J., being disqualified, did not sit in this case.

TEMPLE, J., Concurring.—I think the evidence clearly shows that Carr continued to recognize Hartman as his attorney, after the employment of Patterson, and permitted him to render services, knowing that Hartman supposed the contract was binding, and was the only mode provided for his compensation. I think this amounted to a waiver of full performance on the part of Hartman.

As to the defense that the contract was contra bonos mores, I see no evidence which tends to support it. The title had already been confirmed, and the grounds for supposing the grant a forgery had been laid before the court in an affidavit of the district attorney; and the question pending before the court was whether a new trial should be granted for that reason. I see nothing improper in the employment of counsel to resist such a motion. There is no evidence that any concealment was intended or attempted by Hartman. I, therefore, concur in the judgment.

I concur: Rhodes, C. J.

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PEOPLE, Respondent, v. THOMAS M. LONG, Appellant.

No. 3154; January 11, 1872.

**Criminal Law.—Where Proof of the Corpus Delicti has been had only through the confession of the defendant, a conviction is error.**

APPEAL from County Court, Plumas County.

Attorney General and D. S. Ham for respondent; E. S. Hogan for appellant.

See People v. Long, 43 Cal. 444.

RHODES, J.—It being admitted on the argument that there was no evidence to prove the corpus delicti in the case other than the evidence of the confessions of the defendant, and that alone not being sufficient to justify a conviction (People v. Jones, 31 Cal. 565), it is ordered that the judgment be reversed and cause remanded for a new trial.

We concur: Wallace, J.; Niles, J.

PEOPLE, Respondent, v. THOMAS PICO, Appellant.

No. 3017; January 23, 1872.

**Appeal—Striking Case from Files.**—Where the record bears no evidence that the nominal appellant actually took an appeal, and there is no brief filed by him nor any suggestion of a diminution of the record, the case is to be stricken from the files.

APPEAL from County Court, Los Angeles County.

Attorney General for respondent; V. E. Howard for appellant.

CROCKETT, J.—The record in this case contains no notice of appeal nor anything to indicate that an appeal was taken by the defendant. No brief has been filed on his behalf, nor is there any suggestion of a diminution of the record. The case is therefore not properly in this court, and must be stricken from the files.

It is so ordered.

We concur: Wallace, J.; Niles, J.; Rhodes, J.

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WILLIAM NEWTON MEEKS, Appellant, v. EDWARD C. KIRBY, Respondent.

No. 2711; January 27, 1872.

**Administrator's Sale.—The Statutory Bar Against an Action by an Heir,** or other person claiming under a testator or intestate, to recover real estate sold by an executor or administrator more than three years before, applies to sales void for want of jurisdiction, as distinguished from sales voidable merely for some defect of procedure.

**Administrator's Sale—Bar of Action by Heir.—The Statutory Exception of "Minors** or others under legal disability to sue" from the operation of the bar against an action by an heir, or other person claiming under a testator or intestate, to recover real estate sold by an executor or administrator more than three years before, has reference to a disability personal to the party, and not to the mere condition of his title.

APPEAL from Fifteenth Judicial District, San Francisco County.

W. H. Patterson for appellant; Campbell, Fox & Campbell for respondent.

See Meeks v. Kirby, 47 Cal. 168.

WALLACE, J.—Harlan died seised of the premises in controversy—this was in 1850. In 1856 Aspinall, as administrator of his estate, made a sale of the premises to the defendants and their grantors—this sale was void. It was so determined here in Haynes v. Meeks, 20 Cal. 288, and in Meeks v. Hahn, 20 Cal. 620, in each of which cases the validity of the sale made by Aspinall was brought in question. But the defendants and their grantors occupying the premises at the time they purchased at this void sale afterward remained in possession adversely and continuously until the commencement of this action in 1868—a period of some twelve years; and among other defenses they rely upon the provisions of section 190 of the Probate Act in bar of the action. The language of that section is as follows: "No action for the recovery of any real estate sold by an executor or administrator under the provisions of this chapter shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale."

That the provisions of this section apply to sales absolutely void for want of jurisdiction, as contradistinguished from sales voidable merely for some defect in procedure, was determined by this court in Harlan v. Peck, 33 Cal. 515, 91 Am. Dec. 653, and reaffirmed here in Harlan v. Miller (January Term, 1868, not reported), and the reasoning of Sanderson, J., in the opinion he delivered in the former case is, we think, unanswerable.

It is argued, however, that the plaintiff's case is saved from the bar of section 190 by the effect of the immediately succeeding section 191, which reads as follows: "The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action

at any time within three years after the removal of the disability."

It is said that Meeks, the plaintiff, was under disability to sue because by section 114 of the Probate Act, and the construction first given it by this court in Meeks v. Hahn (supra), and since then steadily adhered to, the administrator of the estate of Harlan was alone authorized to bring an action to recover the premises, and, of course, neither the heirs at law of Harlan, nor Meeks, their grantee, could have maintained the action pending the administration in the probate court. It does not follow, however, that because Meeks' title, such as it was, would not, in point of law, have supported an action to recover the possession of the premises, he is thereby himself become a person "under legal disability to sue," and whose right of action is therefore saved to him by section 191 of the Probate Act. It cannot be said that a party is under legal disability to sue, within the intent of the statute, merely because his alleged cause of action is not invincible, or because his adversary might be possessed of a defense which, if properly interposed, would defeat the action—such, for instance, as the fact here, that the administration of the estate is still pending.

I think that the disability here meant is something personal to the party, and has no reference to the mere condition of his title. The statute is one of repose—it commences to run upon the making of the sale; it was designed, in a measure, to protect and assure; it, in terms, saves the rights of "minors," because they, not being sui juris, are deemed personally incapable of the present assertion of such rights as they may have, and when it, immediately thereafter, mentions "others under any legal disability to sue," I am of opinion that it refers to those only who, having some immediate right of action, are, nevertheless, like "minors" already mentioned, deemed to be, from some cause, laboring under a present personal incapacity to assert it. The cause of action is not, however, itself affected by the supposed disability, nor is the right to sue suspended thereby, for the right of action remains perfect, and the action may be brought while the disability yet attaches. Thus one within the age of majority, and therefore laboring under disability, may, nevertheless,

bring an action at once, though, by reason of his nonage, he be not obliged to do so, in order to avoid the bar.

The plaintiff here has held the title which he now asserts ever since April, 1854; during the intervening time he has not been a minor, nor has he labored under any other legal disability to sue. The case is, therefore, clearly within the bar of the statute relied upon by the defendants. The result reached upon this point renders the consideration of the other grounds of defense unnecessary.

Judgment affirmed.

I concur: Niles, J.

I dissent: Sprague, C. J.

Rhodes, J., being disqualified, did not sit in this case.

CROCKETT, J.—I agree with Mr. Justice Wallace in the opinion that the disability referred to in section 191 of the Probate Act is a personal disability, such as coverture, infancy, and the like, and not a mere inability to maintain an action because of some quality or infirmity of the title which the party holds, whereby he is precluded from maintaining an action for the possession of the property. It has repeatedly been decided by this court that the executor or administrator of an estate is entitled, under the statute of this state, to the exclusive possession of real property belonging to the estate pending the administration, and that he alone can maintain an action to recover the possession of such property, which has been wrongfully withheld. The heir or devisee could not, therefore, maintain the action, so long as there was an executor or administrator, who, in law, had a better, and an exclusive, right to the possession. The title which Harlan's heirs took by descent from their ancestor did not, in law, entitle them to maintain an action for the possession, pending the administration of the estate. In other words, the estate which they inherited was of such a nature as not to entitle them to the possession of the property pending the administration. When the plaintiff acquired the title of the heirs, he took it subject to the same conditions. His inability to maintain an action resulted from the nature and quality of his title, and not from any personal disability to sue, and

it is only to this latter class of disabilities that section 191 of the Probate Act refers. It would be a misapplication of terms to say that a person is under a disability to sue, if the only obstacle in the way of his maintaining the action proceeds from the condition or nature of his title. Great injustice and hardship may, and often do, result from the inability of the heir or devisee to maintain an action to recover the possession from a wrongdoer, pending the administration of the estate. But if the statute regulating the relative rights of the executor or administrator and the heir or devisee, as to the possession of the property, have been correctly interpreted by the courts, it is quite evident that more legislation is needed for the protection of the heir or devisee against the laches of an executor or administrator, whose duty it is to institute actions within the proper time to recover property wrongfully withheld from the estate.

I concur both in the reasoning of Mr. Justice Wallace and in the result at which he has arrived.

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GEO. K. PORTER, Appellant, v. H. H. HAIGHT et al., Respondents.

No. 2773; March 8, 1872.

**Convict Labor—Contract for.—A Board of Directors of the state prison cannot make a contract for convict labor which shall extend beyond the limits of their term of office.**

APPEAL from Seventh Judicial District, Marin County.

B. S. Brooks for appellant; Hambleton & Gordon for respondents.

See Porter v. Haight, 45 Cal. 631.

NILES, J.—In July, 1863, the board of directors of the state prison made a contract with the plaintiff for the employment by the latter of certain convict labor for the period of three years. In May, 1865, the members of the board having

been changed by new election, the contract, in a modified form, was extended by the then existing board for the period of four years from the first day of September, 1866. In April, 1868, the defendants, then constituting the board of directors as successors to the board last above named, notified the plaintiff that they deemed and held the contract theretofore made between him "and the former board of directors, to be of no effect or binding force upon the present directors, or the state of California, after the expiration of the term of office of the former board," and that they would thereafter demand an increased price for convict labor. The plaintiff protested against this action, and refused to comply with the terms imposed. Thereupon the board withheld from the plaintiff the convict labor. The action is in trespass, against the defendants individually.

Upon these facts proven, the defendants moved for a nonsuit upon the grounds, among others, that the contract was unauthorized by law. A judgment of nonsuit was rendered, and from that judgment, and from the order refusing a new trial afterward entered, plaintiff appeals.

By the act of April 24, 1858 (Stats. 1858, p. 259), it is provided that "the governor, lieutenant governor, and secretary of state, are hereby constituted a board of directors, whose duty it shall be to take charge of the state prison at San Quentin, and have the management and control of the state prison convicts. Said board shall have full and exclusive control of all the state prison grounds, buildings, prisoners, prison labor, prison property, and all other things belonging or pertaining to said state prison." I do not think that a board of directors can make a contract for convict labor which shall extend beyond the limits of their term of office. If such contract may be made for an unlimited time, it is obvious that it would be in the power of the board to seriously trammel its successors in the performance of their required duties. Each board is required by law to assume and exercise "full and exclusive control of all . . . . prisoners, prison labor, prison property, and all other things belonging or pertaining to said state prison." It is difficult to see how this could be accomplished in the face of a binding contract for prison labor made by their predecessors.

A board can only contract for that labor which was intrusted to it for the time being. That is the only labor over which it has control. It cannot dispose of prison labor beyond the limit of its term of office, any more than it could interfere in other ways in the discretionary exercise of power by its successors: Trask v. State, 32 N. J. L. 479.

I am of opinion that the nonsuit was properly granted. Judgment and order affirmed.

We concur: Wallace, C. J.; Crockett, J.

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## THE OAKLAND COTTON MANUFACTURING CO., Respondent, v. JOHN G. JENNINGS, Appellant.

No. 2380; March 8, 1872.

**Shipping—Who Liable on Contracts of Affreightment.**—A person who charters a vessel, and by the terms of his contract as well as in fact assumes the exclusive possession, command and navigation of the vessel, whether for a particular voyage or an indefinite time, is the owner pro hac vice, and alone responsible upon contracts of affreightment.

**Shipping.—In the Respect of Responsibility upon Contracts of** affreightment, after the owner of a vessel has let the latter to the master, the same law governs as would govern in the case of a letting to a stranger.

**Shipping.—The Exemption from Liability Enjoyed by the Owner** of a vessel for acts or omissions of a charterer, by which a bailor is aggrieved, or of a master assuming a relation to the owner similar to that of a charterer, is not lessened by the fact that under their contract the owner is to bear the expense of the vessel's repairs.

APPEAL from Third Judicial District, Alameda County.

Botts & Wise for respondent; Milton Andros and McAllister & Bergin for appellant.

See Oakland Cotton Mfg. Co. v. Jennings, 46 Cal. 176, 13 Am. Rep. 209.

NILES, J.—The defendant, a shipbuilder, was the general and registered owner of the schooner "Greenfield." While so

the owner he appointed one Horton master. Subsequently he entered into an agreement with Horton, by which it was agreed that Horton was to have the entire control and possession of the schooner, to make all contracts in regard to the freighting and business, to engage her in any business he might desire within the inland waters of this state, to victual, man and run her at his own expense, and was to collect all the earnings and freight moneys, and pay to defendant one-third of the gross earnings at the end of each and every month, or as often as a settlement was had between them; the defendant to keep the schooner seaworthy and in repair. Subsequently Horton entered into a partnership with one Finney in the running of the schooner, and Horton and Finney made all contracts in regard to her business, and employed her as they saw fit and proper, and had entire and exclusive possession and control of her.

The plaintiff contracted with Finney, acting for himself and Horton, to carry certain goods. Owing to negligent stowage the schooner capsized and the goods were lost.

The case was tried by a jury. The counsel for defendant asked the court to give to the jury the following instruction: "If you shall find that the schooner 'Greenfield' was at the time of the accident employed under agreement with defendant by Captain Horton, the master thereof, on shares, and that Captain Horton at that time manned and victualed said vessel at his own expense, and paid all expenses of running her except for repairs, and employed her in carrying freight, he collecting the freight money and accounting to the owner only for the share of the latter, and that said Horton had at the time, by virtue of said agreement, exclusive possession and control of her, your verdict will be for the defendant."

The court refused this instruction, and upon its own motion instructed the jury "that no arrangement that may exist between the general owner and charterer of his vessel as to the employment and custody of the vessel can affect third parties dealing with the master or charterer of the vessel, unless it is shown that they had received notice of such arrangement."

These rulings are assigned by the defendant as error.

There is no doubt that the charterer of a vessel, who has by the terms of his contract, and assumes in fact, the exclusive possession, command and navigation of the vessel, either for a particular voyage or for an indefinite time, is the owner pro

hac vice, and is alone responsible upon contracts of affreightment.

I think the same exemption of the general owner from liability attaches to a contract made between him and the master appointed by him as to a similar contract made with a charterer. Upon this point the authorities are conflicting. The weight of authority favors the principle that the rights and liabilities of the parties are the same whether the vessel is let to the captain or to a stranger.

The owner has no control over the vessel, or its voyages, or the terms or parties to the affreightment contracts. He can neither sanction nor repudiate any act of the charterer or remove him at will. There is no relation of principal and agent existing between them.

It is not essential that third parties should have notice of the chartering to relieve the owner from personal liability. A charter-party is not a conveyance which is required to be recorded, to impart notice to third parties as to the personal liability of the owner: Mett v. Ruckman, 3 Blatchf. (C. C.) 71, Fed. Cas. No. 9881; 3 Kent Com. 134; Reeve v. Davis, 1 Ad. & El. 312, 110 Eng. Reprint, 1224.

In the latter case it was said by Mr. Justice Littlefield that the registry acts did not necessarily show who were the owners liable for repairs; that they were not passed for this purpose; that this works no hardship to the tradesman, for "he has always the means of knowing who are substantially the owners by asking the captain to show the charter-party; if this is refused, he may decline dealing."

It is urged by counsel for respondent that the defendant in this case had not parted with the entire possession and control of the schooner, because by the terms of the charter-party Horton could only engage her within the inland waters of the state, and the defendant was to keep her in repair. I do not see in what these agreements differ in principle from the ordinary covenants of a lease of a store-building, which prohibit the storage of extrahazardous goods and reserve the right of the landlord to enter and make repairs.

In my opinion there was error both in the instruction given and in the refusal to give the instruction asked by the defendant.

Judgment reversed and cause remanded.

We concur: Wallace, C. J.; Rhodes, J.; Crockett, J.

NANCY JANE HILL, Administratrix, Respondent, v. T. L. GRIGSBY, Appellant.

No. 2976; April 17, 1872.

**Bills and Notes—Delivery.—A Note Placed in the Keeping of a Person,** not named in it as a party, who was to deliver it only on a stated contingency, cannot be enforced by the payee's administrator who has got hold of it without the contingency taking place.

APPEAL from Seventh Judicial District, Napa County.

Pendergast & Stoney for respondent; Hartson & Burnell for appellant.

See Hill v. Grigsby, 35 Cal. 656.

CROCKETT, J.—The action is upon a promissory note made by the defendants and payable to James Hill, now deceased. The defendants admit the execution of the note, but deny that it was ever delivered to the payee or anyone for him except as an escrow, upon a condition which has not happened. They proved at the trial by several witnesses, who were in no wise impeached or contradicted, that there were pending suits and controversies between the said James Hill and the defendant, T. L. Grigsby, who was in failing circumstances and was also indebted to one Christiansen; that said Grigsby was about to apply for the benefit of the bankrupt law of the United States, and that whilst their affairs were in this condition, a compromise was agreed upon between said Hill and Grigsby, whereby the latter was to execute to the former the promissory note sued upon in this action, with the other two defendants as indorsers or sureties, but only on condition that Grigsby could effect a similar compromise with Christiansen; that Hill acceded to these terms, and it was then mutually agreed that the note, when executed, should be placed in an envelope, together with proper receipts or discharges from Hill to Grigsby, together with some other papers, and that the package should be placed in the hands of one Bruck, to be held by him until it could be ascertained whether Grigsby could effect the compromise with Christiansen, in which event Bruck was to deliver the note to Hill and the receipts to

Grigsby; that the note was accordingly made by the defendants and placed in an envelope, together with the receipts from Hill or his attorneys; that the envelope was then sealed up and delivered to Bruck, with a further agreement that it was not to be withdrawn from his possession except upon the joint order of the attorneys for Hill and Grigsby; that Grigsby immediately endeavored to effect a compromise with Christiansen but failed to accomplish it, and thereupon applied for the benefit of the bankrupt law. There is no conflict whatever in the testimony as to the agreement between Hill and Grigsby, to the effect that the note was not to be delivered to Hill or to take effect as a binding obligation upon the defendants, except on the condition that Grigsby should succeed in effecting the proposed compromise with Christiansen. But Mr. Pendegast, a witness for the plaintiffs, testifies that he was the law partner of Mr. Rayle, who acted as the attorney for Hill in the matter of the compromise with Grigsby; that in September, 1868, Rayle called his attention to a sealed envelope containing papers which was then in their office; that the witness then put the package in his desk without opening it; that Mr. Rayle was absent for several weeks and died soon after his return; that some months thereafter the witness found the package in his desk where he had placed it, and on opening it found it to contain a bond for a deed from Hill to Grigsby and Smittle, with a release indorsed thereon signed by Grigsby and Smittle; also eleven old promissory notes, one made by Grigsby and the others by Grigsby and Smittle in favor of Hill, and also two receipts in full, one from Hill to Grigsby and the other to Grigsby and Smittle; but these were the only papers contained in the envelope when he opened it. Goodman, another witness for the plaintiffs, testified that before the death of Mr. Rayle the note sued upon was deposited at his bank for collection, and that shortly before Hill died in February, 1870, he directed the witness to collect the interest due on the note. The witness Bruck also testified that he delivered the package left with him to Mr. Rayle shortly before his death, on being assured by the latter that the attorney for Grigsby consented thereto, but the attorney testifies that he gave no such consent and was not aware that the package had been delivered to Rayle. The note in suit is dated May 15, 1868, and the receipts found in the envelope

and the satisfaction of the bond also inclosed therein when opened by Mr. Pendegast all bear date May 21, 1868. These being the facts, the jury found a verdict for the plaintiffs and a judgment was entered accordingly. The defendants move for a new trial on the ground that the evidence was insufficient to support the verdict and judgment, and that they were against law. The motion for a new trial was denied and the defendants appeal. I think the verdict ought to have been set aside and a new trial granted. There is not the slightest conflict in the evidence as to the terms of the agreement between Hill and Grigsby at the time of the making of the note, nor indeed as to any other fact in the case. The package containing the note and other papers appears to have been inadvertently delivered by Bruck to Rayle, without the consent of the adverse attorney; and the fact that the note was not found in the envelope when opened by Mr. Pendegast and was delivered to Goodman for collection before Rayle's death does not prove, or tend to prove, that the note was not in the envelope when it was delivered to Bruck and by the latter to Rayle. Several unimpeached witnesses testify that it was in the package when Bruck received it, and he testifies that it was in the same condition when delivered to Rayle. But in whose possession the package was between the time when Rayle received it and when he delivered it to Pendegast does not appear, and there is nothing to show that it was not opened in the interim. But if it be conceded that the note never was inclosed in the envelope, this would not show, or tend to show, that the agreement between Hill and Grigsby was otherwise than as testified to by the latter and his witnesses. The note may have been left out of the package through inadvertence and they may have been mistaken in testifying that it was inclosed in it. But this does not touch the question as to the agreement that the note was delivered as an escrow, to take effect on the happening of a future event, which has not transpired.

Judgment reversed and cause remanded for a new trial.

We concur: Rhodes, J.; Niles, J.

PEOPLE, Respondent, v. EDWARD PHELAN, Appellant.

No. 3083; April 17, 1872.

**An Indictment is not Bad Because One Member of the Grand Jury was Lacking** from the members of the body considering the case, he having been challenged by the person charged, and the challenge having been allowed by the court, but not so that he became no longer a member of the whole body, thus necessitating the appointment of a new member in his place.

APPEAL from County Court, El Dorado County.

Attorney General for respondent.

BELCHER, J.—The defendant was indicted in the county of El Dorado for the crime of arson. The only question presented on this appeal is: Was the indictment found by a legally constituted grand jury?

Seventeen persons were called and sworn to act as a grand jury. The defendant was present and challenged one of them, and the challenge was allowed by the court, and the challenged juror was directed not to be present or take part in the consideration of the charge against the defendant. The indictment was found and returned by the remaining sixteen.

It is claimed that the indictment should have been set aside because the minimum number who could constitute a legal grand jury was seventeen, and only sixteen were qualified to act upon this case.

The question is not an open one in this state. Precisely the same objection was raised and overruled in the case of People v. Butler, 8 Cal. 435, and again, after full argument, in the case of People v. Gatewood, 20 Cal. 146. We are satisfied with the decision in those cases.

Judgment affirmed.

We concur: Wallace, C. J.; Crockett, J.; Niles, J.; Rhodes, J.

ADELIA HILL, Respondent, v. WILLIAM WEISLER, Appellant.

No. 2705; April 17, 1872.

**Waters—Destruction of Ditch—Loss of Water—Sales.**—In an action against a person for washing away the plaintiff's ditch, causing him a loss of water sales, a variance in describing the ditch is immaterial, if the defendant could not be misled by it, particularly if the ditch was the only one in the vicinity running water at the time and was so identified.

**Action—Injury to Property—Relative Values.**—The right of a person to redress for an injury to property cannot depend upon the value of the property injured as contrasted with the value of another's business enterprise, in the promotion of which the injury came about.

**Waters—Injury to Ditch.—When the Only Damage Claimed** through the defendant's alleged injury of the plaintiff's ditch is the loss of water sales, the cost or value of the ditch as a structure, separate and apart from the water rights, has nothing to do with determining the damages.

**Custom.—Proof of Custom is not Admissible** to oppose or alter a rule of law, or to change the legal rights and liabilities of parties as fixed by law.

**Waters—Injury to Ditch not Justified by Custom.**—A vested right is acquired by the location and construction of a ditch, and to mine it away is recognized by law as an injury; the trespass cannot be justified by custom.

APPEAL from Fourteenth Judicial District, Placer County.

C. A. Tuttle for respondent; Joe Hamilton for appellant.

See Hill v. Weisler, 49 Cal. 146.

NILES, J.—The plaintiff claims to be the owner of a ditch crossing certain mining claims of the defendant. In the course of defendant's mining operations he washed away a portion of the ditch.

The action is for damages, with a prayer for an injunction to prevent future injuries. A jury trial was had, which resulted in a verdict for plaintiff. The defendant moved for a new trial upon several grounds.

1. The complaint alleges as a part of the description of plaintiff's ditch that it was excavated from a certain named point, to a point where a certain shaft had been sunk in the earth, two years before the commencement of the suit. The plaintiff's witnesses testified to a ditch which did not reach the shaft, but ran from ten to forty feet below it. The defendant objected to this proof upon the ground that it described another and different ditch from that described in the complaint.

The variance was immaterial. There was sufficient in the description to identify the ditch, omitting that part which mentions the shaft as one of the termini. It appeared, moreover, that the ditch described by the witnesses was the only one then running water in that vicinity, and was the ditch washed away by the defendant. The defendant could not have been misled by the description.

2. The defendant offered to prove that his mining claims were of great value, and that he had expended large sums in their development—while the ditch of plaintiff had been constructed at small cost and was of little value. This testimony was properly excluded. It could not affect the right of the plaintiff to recover; or the right to redress for an injury to property cannot in any case depend upon the value of the property injured. Nor could it, in this case, affect the question of the amount of damage to which the plaintiff was entitled. The only damage claimed by the complaint was for the loss of water sales. The cost or value of the ditch as a structure, and separate from the water rights belonging to it, could not assist in determining the amount of damages.

3. The defendant offered proof of the custom of miners in that vicinity to mine away lateral and side ditches, without liability for damages, whenever it became necessary to do so in the course of mining; and subsequently asked the court to give an instruction based upon this theory. The court very properly excluded the evidence and refused the instruction. This was not an action "respecting mining claims," and does not come within the rule of the statute admitting proof of the "customs, usages or regulations" of miners. Proof of custom is not admissible to oppose or alter a rule of law, or to change the legal rights and liabilities of parties as fixed by law. A vested right is acquired by the location and construc-

tion of a ditch. It is an injury to mine it away, and so recognized by law. The trespass cannot be justified by custom.

There was no error in the refusal to give the other instructions asked by defendant. The grounds of refusal are very clearly and satisfactorily stated by the district judge.

Judgment and order affirmed.

We concur: Wallace, C. J.; Belcher, J.; Crockett, J.

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PEOPLE, Respondent, v. RAFAEL BATIERREZ, Indicted as RAFAEL BARTERAS, Appellant.

No. 3235; June 27, 1872.

**Criminal Law.—An Appeal Left Unprosecuted After Being Brought up can be disposed of only by an affirmation of the judgment.**

APPEAL from Seventeenth Judicial District, San Bernardino County.

Attorney General for respondent; Sparks & Harris for appellant.

WALLACE, C. J.—The prisoner was convicted of the crime of murder in the first degree, and on the 15th of January, 1872, was adjudged to suffer death. On the 29th of January, he, by his attorneys, gave notice of appeal to this court, and the record being filed here on the 15th of February, a supersedeas was ordered. At the next following April term of this court, on the tenth day of April, 1872, the cause was regularly called in its order on the calendar, when, no one appearing for the prisoner, it was ordered to be submitted, with leave to the attorneys for the appellant to file a brief in thirty days from that day. No brief or points, however, have been filed within the prescribed time, which has fully elapsed, and no application for further time appears to have been made.

Upon examination of the record, we discover no error in the proceedings nor any legal reason why the judgment should be disturbed by us.

Judgment and order denying a new trial affirmed, and the court below directed to fix a day to carry the sentence into execution.

We concur: Belcher, J.; Niles, J.

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F. W. PATY, Appellant, v. J. R. SMITH, Respondent.

No. 2941; July 9, 1872.

**Probate Court—Time of Creation of Jurisdiction.**—The probate courts have no jurisdiction of the estates of persons who died previously to the time of the enactment of the probate laws of the state.

**Probate Sale—Estate of Person Deceased in 1850.**—A sale, under an order of a probate court, on the 4th of October, 1851, of lands of a person dying on the 14th of February, 1850, could be of no valid effect.

**Infant—Sale of Estate by Mother.**—A Special Act of the Legislature intending to empower the mother, and as such the natural guardian, of an infant to sell the interest of such infant in his deceased father's estate, would not bestow the power intended.

APPEAL from Twelfth Judicial District, San Francisco County.

Barstow, Stetson & Houghton for appellant; Daingerfield & Olney for respondent.

See Paty v. Smith, 50 Cal. 153.

BELCHER, J.—This is an action to recover possession of the undivided one-fourth of certain premises situated in the city of San Francisco. William Paty became the owner of the premises in 1849 and died intestate on the 14th of February, 1850, leaving as his heirs at law his widow and three minor children. One of these children, Charles M. Paty, died in 1857, under age and never having been married. Francis W. Paty, the plaintiff, is one of the surviving children, and claims as the heir of his father and brother.

On the 25th of February, 1850, letters of administration upon the estate of William Paty were granted by John W.

Geary, "Alcalde and ex-officio Probate Judge," to John H. Gleason and John Paty, who thereupon duly qualified as such administrators, filed bonds, inventories, etc.

No other steps appear to have been taken toward settling the estate until the 31st of July, 1851, when Gleason, one of the administrators, filed a petition in the probate court asking for an order to sell the premises in controversy to pay the debts of the estate. An order to sell was made by the court and the property sold to the grantor of the defendant on the 4th of October, 1851.

On the 6th of May, 1861, an act was passed by the legislature (Stats. 1861, p. 293), entitled "An act to authorize the guardian of Francis William Paty to sell and convey certain real estate," in these words:

"Section 1. Martha Ann Paty Dayley, the mother and guardian of Francis William Paty, a minor, is hereby authorized and empowered to sell at public, or private, sale, in her discretion, any, or all, of the real estate, or interest therein, of the said Francis William Paty as shall in her opinion most promote his interests.

"Sec. 2. On making any such sale, or sales, the said Martha Ann Paty Dayley may convey the property so sold to the purchaser, or purchasers, thereof, and receive the purchase money therefor, and the title so conveyed shall be valid, and convey all the interest of the said minor in the property so sold.

"Sec. 3. The said Martha Ann Paty Dayley shall account for the proceeds of such sales as for any other assets in her hands pertaining to said minor.

"Sec. 4. No deed, or conveyance, of the said real estate, or any part thereof, made under the provisions of this act, shall be valid, or convey any title, unless the sale shall have been confirmed by the Probate Court, previous to the execution of such deed of conveyance."

In pursuance of this act Mrs. Paty, who had become Mrs. Dayley, by intermarrying with one James Dayley in 1860, for a valuable consideration sold to the defendant's grantor all the interest of Francis W. Paty in the premises in controversy, and having reported such sale to the probate court and obtained its confirmation thereof, executed to the purchaser a deed.

It does not appear that Mrs. Dayley was ever appointed the guardian of Francis W. Paty in this state, but she was appointed such guardian by a probate court in the state of Massachusetts in the year 1850 and by the supreme court of the Hawaiian Islands in the year 1856.

1. It is agreed that Francis W. Paty, as the heir of his father, took an undivided one-sixth interest in the premises. Under the seventh subdivision of the first section of the act concerning descents and distributions, he inherited from his brother, Charles M. Paty, an undivided one-twelfth, making his whole interest one undivided fourth: De Castro v. Barry, 18 Cal. 96.

2. It has been settled by a series of decisions in this state that the probate courts have no jurisdiction of the estates of persons who died prior to the passage of our probate laws: Grimes v. Norris, 6 Cal. 621, 65 Am. Dec. 545; Tevis v. Pitcher, 10 Cal. 477; De la Guerra v. Packard, 17 Cal. 182; Downer v. Smith, 24 Cal. 123; Coppinger v. Rice, 33 Cal. 408. Under the authority of these decisions it must be held that the order of the probate court, under which the premises were sold on the 4th of October, 1851, was without jurisdiction and void. Ryder v. Cohn, 37 Cal. 69, is not in conflict with the cases above cited.

3. We do not consider that the question as to whether the legislature can constitutionally, by a special act, authorize a guardian to sell, at his discretion, the real property of his ward arises in this case. It does not appear that Mrs. Dayley was ever appointed the guardian of the plaintiff in this state, and her appointments as such in Massachusetts and in the Hawaiian Islands were local and could have no effect outside of the jurisdictions where they were made: Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 156; Story's Conflict of Laws, sec. 499. The special act calls her guardian, but it was neither its purpose nor effect to constitute her such, nor does it furnish any evidence that she had, in fact, been appointed: Kimball v. Semple, 25 Cal. 446. Moreover, after her marriage to Dayley she was disqualified from either receiving or holding such an appointment: Act for the Appointment of Guardians, sec. 5. She was the natural guardian of the person of her minor son, but as such had no authority to sell or in any way to dispose of his property: Kendall v. Miller, 9 Cal. 591; May

v. Calder, 2 Mass. 55; Combs v. Jackson, 2 Wend. (N. Y.) 157, 19 Am. Dec. 568.

The only question, then, is: Could the legislature authorize her, as mother and natural guardian, to sell in her discretion any or all of her son's real estate "as shall in her opinion most promote his interests"?

In Brenham v. Story, 39 Cal. 179, there was called in question the constitutionality of an act of the legislature very similar in its terms to the act of May 6, 1861. That act authorized the administrator to sell at his discretion "the whole or any portion of the real estate, or any right, title or interest therein, claimed, held or owned by the said Charles White at the time of his death, as in the judgment of the administrator will best promote the interest of those entitled to the estate." It was held that the administrator had no right to sell the estate for the purpose of promoting the interest of the heirs, and that the act which authorized him to do so was unconstitutional and void.

We consider that case as decisive of this. If the administrator, as such, cannot be permitted to speculate with the property of the estate when he may judge it will promote the interest of the heir, neither can the mother, as such, speculate with the property of her son because in her opinion it will promote his interest. The same considerations of policy and law which forbid the one equally forbid the other.

As mother and natural guardian she is in no way charged with the possession, control or management of her son's estate, and can no more be permitted to sell it to promote his interest than could any third person who sustained no relations toward the estate or its owner.

Judgment and order reversed and cause remanded.

We concur: Crockett, J.; Wallace, C. J.; Rhodes, J.

## C. C. BUTLER, Respondent, v. LARNSON S. WELTON et al., Appellants.

No. 3173; July 9, 1872.

**Trusts—Execution of Deed by One of Two Trustees.**—Where a trust deed provides among other things that one of the two joint trustees shall be competent to hold and act in case the other resigns the trust, the execution by one of them of a resignation and its delivery by him to his cotrustee, who is also his copartner in business and general attorney in fact, and who deposits the instrument immediately in the office safe among the firm papers, in which depository it is discovered after his death, are facts not sufficient to validate a deed of the trust property executed by only the trustee to whom the delivery was made, but in the body of which both persons are named as trustees.

**Trusts—Execution of Deed by One Trustee on Resignation of Other.**—The condition expressed in a deed of trust to two persons jointly that if one resigns the other shall hold and act alone unless, by some appropriate instrument in writing, the cestui que trust appoints another cotrustee, is not satisfied if, after a resignation by one of the trustees, the other alone executes a deed of the trust property, such deed not showing on its face, or it not being shown otherwise, that the cestui que trust was aware of the resignation before the execution of the deed.

**Trusts—Resignation of Cotrustee.**—A Writing by a Cestui Que Trust, uncalled for in law or by the terms of the trust deed, giving permission to a trustee to resign, is, in case the trustee thereupon executes a resignation and delivers it to his cotrustee who immediately deposits it in their office safe (the two being partners in business), no evidence that the cestui que trust was informed of the resignation so that she could appoint a successor, if under the deed of trust she was empowered so to appoint in case of a resignation.

**Trusts—Resignation by Cotrustee.**—Where a Deed of Trust Does not Provide that a joint trust is to be made an individual one simply by the delivery of his written resignation by one trustee to his cotrustee, it requires other formalities to bring such a purpose into effect.

**Trusts—Resignation of Trustee.**—To be Valid, the Delivery of a Written instrument intended to effect his resignation by a trustee must, as in the case of the delivery of other written instruments, be such as to put the instrument beyond the power of the person executing it.

**Acknowledgment.**—A Deed by a Married Woman of Her Separate Property must, in order to pass title, be acknowledged by her, and her acknowledgment certified, in the manner required by the statute.

APPEAL from Twelfth Judicial District, San Francisco County.

I. B. Hart for respondent; Hale & Edmonds for appellants.

WALLACE, C. J.—In April, 1851, Merit Welton and Charles H. Ingalls, by deed of that date, conveyed certain premises, of which the premises in controversy are a portion, to Roger S. Baldwin and Charles T. H. Palmer, as trustees, upon the following trusts expressed upon the face of the deed, that is to say: First, that during the coverture of Elizabeth (wife of said Merit, one of the grantors) the trustees should manage and control the trust estate and pay the proceeds to said Elizabeth. Second, upon the said Elizabeth becoming discovert by the death of her said husband, Merit Welton to convey the estate to her. Third, that the said trustees shall have power, with the approbation or at the request of said Elizabeth expressed in writing, to sell and dispose of the said trust estate or any part of it, and the proceeds to invest in other real or personal estate according to the written direction of the said Elizabeth; and the estate so purchased to be held by the trustees upon the same trusts and for the same uses and purposes as aforesaid. Fourth, that in case of the decease of either of the above trustees, or the resignation of this trust by either of them, the survivor or either of them shall hold the whole of the estate as sole trustee, subject to the provisions herein set forth and expressed, unless some other person or persons shall be appointed by the said Elizabeth to be cotrustee or trustees under the provisions herein expressed, and in case of the decease of the said Baldwin and Palmer, or of their resignation of this trust, they or their executors or administrators shall convey, transfer and pay over the whole of the trust estate then held by them to such person or persons as may be appointed in writing by said Elizabeth to be the trustee or trustees of such trust estate, and such new trustee or trustees shall have all the powers and shall hold the trust estate subject to all the provisions herein expressed, etc. The trustees, Baldwin and Palmer, accepted the conveyance and the trust thereby created, but on the 20th of June, 1851, less than two months afterward, Elizabeth Welton, the cestui que trust, gave her

consent in writing, bearing date of that day, "that Charles T. H. Palmer shall resign his trust which he holds in common with Roger S. Baldwin to property deeded to said Palmer and Baldwin by Merit W. Welton and Charles H. Ingalls for my benefit whenever he may wish." Five days thereafter, on the twenty-fifth day of June, 1851, Palmer executed under his hand and seal a paper purporting upon its face to resign his trust in the premises, the language being: "Hereby utterly resign my office as trustee of the said Elizabeth S. Welton and her heirs from this day and declare myself henceforth no party to and not liable for any contract, action, or business connected with said estate," and gave it to his cotrustee, Baldwin, who was his copartner in business and his general attorney in fact, who placed it in a safe among the papers belonging to himself and Palmer, where it was subsequently found by Palmer upon the decease of Baldwin in 1856. In September, 1852, Merit Welton, Elizabeth Welton, his wife, and Roger S. Baldwin, "for himself and Charles T. H. Palmer, trustees for Elizabeth S. Welton, wife of the said Merit Welton," conveyed or attempted to convey the entire premises constituting the real estate held in trust to one Brown for the purported consideration of seven hundred and fifty dollars, paid in hand, the conveyance purporting upon its face to be executed by said Merit and Elizabeth as grantors, and also by "Roger S. Baldwin, Chas. T. H. Palmer p. p. Roger S. Baldwin atty., trustees," and acknowledged by Baldwin as trustee and by Merit Welton and Elizabeth, his wife, in the usual form before a notary public, the certificate, however, not stating that the contents thereof were explained or made known to the said Elizabeth by the officer receiving and certifying her acknowledgment. The plaintiff Butler derives his asserted title to the premises in controversy through the conveyance to Brown, and being in possession, brought this action against the defendant Palmer as surviving trustee, and the other defendants, heirs at law of Merit Welton and Elizabeth, his wife, both of whom are deceased, alleging "that Palmer executed said deed by his attorney in fact, the said Roger S. Baldwin, Jr.; that the said Palmer had prior to that time made said Baldwin his attorney in fact by power of attorney, which was not recorded, or it may be that the said Baldwin was the sole trustee for the

said Elizabeth S. Welton at the time of the execution of the said deed to the said Brown, and that prior thereto the said Palmer had resigned his trusteeship," and praying that the defendants be compelled by decree to execute and deliver to the plaintiff a conveyance for the premises derived by him under the deed to Brown.

The defendant Palmer appeared in the action, admits that he was one of the grantees in trust named in the deed of April, 1851, and prays to be relieved by the decree of the court from the trust thereby created. The other defendants, the Welton heirs, answered the complaint, denying all its allegations except the allegation that the plaintiff is in possession of the premises and that they, the defendants, claim an estate therein adverse to the plaintiff. They also set up that the deed to Brown was invalid and ineffectual to convey the trust estate, because of the failure of Palmer, the cotrustee, to unite therein, etc.

A trial was had and judgment being rendered for the plaintiff, the defendants moved for a new trial, which was denied, and this appeal is taken from the judgment and order denying a new trial.

1. Assuming that, at the time the conveyance was made to Brown, Palmer had not been devested of his trust, it follows that the deed to Brown not having been executed by him, but only by his cotrustee Baldwin, was ineffectual to convey the legal estate: Welton v. Palmer, 39 Cal. 456; Learned v. Welton, 40 Cal. 350, etc.

2. Nor was that deed aided in any respect by the signature of Mrs. Elizabeth Welton, as a purported grantor therein, for as her deed it was absolutely void to all intents and purposes, because not acknowledged or certified in the manner required by law: Pease v. Barbiers, 10 Cal. 40; Maclay v. Love, 25 Cal. 367, 85 Am. Dec. 133.

3. That Palmer at the time the conveyance was made to Brown had not been devested of the trust he had accepted by the deed of April, 1851, is clear. The consent of Mrs. Welton given on June 20, 1851, to the effect that he might thereafter resign whenever he might wish to do so amounts to nothing—he already had that right under the very terms of the trust deed itself, and the consent of the cestui que trust, accorded or withheld, could not affect his mere power

to withdraw from the further exercise of his trust—and certainly that consent did not proprio vigore terminate the relation. What act was subsequently done by Palmer to relinquish the trust? He executed an instrument by which he purported to resign it—gave the instrument to his cotrustee, who was also his partner and general attorney in fact, by whom it was placed in their private safe and never came to light until years afterward, when in 1856 Palmer himself discovered it after Baldwin's death among the papers belonging to Baldwin and himself. The resignation itself was never delivered nor put beyond the power of Palmer. Baldwin, as cotrustee, had no authority to accept it. His powers under the trust deed of April, 1851, did not extend to or include the power to accept the resignation of his cotrustee, and so far as effectuating a resignation of the trust, Palmer might as well have placed it among his own papers or kept it in his pocket. Mrs. Welton, the cestui que trust, does not appear to have known or been informed that the resignation had been actually made or even attempted, and the conveyance to Brown, under which the plaintiff claims title, shows that no such resignation was understood to have occurred, for it purports upon its face to be an attempt to convey made by both Baldwin and Palmer, as trustees, continuing at that time to jointly represent their cestui que trust, Mrs. Welton. It is unaccountable that Baldwin, to whom alone the resignation is said to have been delivered, and who purports to have then had it in his private custody, should have still continued to act as trustee jointly with Palmer if he understood that the latter had actually and definitely relinquished his trust. That Palmer himself did not understand that he had resigned his trust is further shown, too, from the fact that years afterward, and after Baldwin's death, he, as surviving trustee, executed conveyances of portions of the trust estate in conjunction with his cestui que trust, Mrs. Welton, and it is not pretended that he had ever been reappointed as trustee.

4. There can be no doubt, as a general proposition, that it is competent to the parties to a conveyance in trust to regulate and prescribe the steps to be taken by a trustee in resigning his trust without the necessity of a resort to a court of equity for that purpose. That the trust deed under consideration here contemplated and in effect provided that a

resignation of either of the trustees before it could operate to vest the entire legal estate in the other trustee should be notified to Mrs. Welton, the cestui que trust, or in some way brought to her attention is clear. It will be observed that by the terms of the deed, upon the resignation of one of the trustees, the entire trust estate is not to vest in the other absolutely or at all events, but only "unless some other person or persons shall be appointed in writing by the said Elizabeth S. Welton to be cotrustee or trustees under the provision herein expressed, etc." In that event the estate of the original trustee and of the substituted trustee is to continue to be joint. The cestui que trust is clothed with a power of appointment of a new trustee in case of resignation. This is an important power vested in her—one of a highly beneficial nature, and which, in the estimation of the parties, tended to guard and secure the scheme discernible in the trust deed. The cestui que trust was not to be deprived of the protection afforded her by two trustees acting jointly for her benefit about the trust estate; at least, she was not to be so deprived except she should consent thereto. This consent could, of course, appear only after failure upon her part to nominate a successor to fill the vacancy, and there could be no such failure upon her part until after notice or knowledge of the fact that the vacancy had actually occurred.

5. We have seen already that the conveyance to Brown as a deed of Mrs. Welton, a feme covert, was void to all intents and purposes. As being her written consent, if it was such, to the conveyance made by only one of the trustees, the other trustee not joining therein, it is not less a nullity upon her part as being in plain violation of the provisions of the trust deed itself, which forbade her consent to the sole deed of a single trustee if two trustees were at the time acting about the trust estate.

6. The facts of the case appear by the stipulation found in the record, the exhibits admitted by the parties and the findings of the court filed, and we are of opinion that upon these the defendants are entitled to judgment.

Judgment reversed and cause remanded, with directions to render judgment for the defendants in accordance with the prayer of their answer.

We concur: Niles, J.; Belcher, J.; Rhodes, J.

MARY KELLY, Respondent, v. WILLIAM F. FRAZIER, Appellant.

No. 3063; July 9, 1872.

**Negligence—Presumption in Favor of Judgment for Personal Injuries.**—Upon a judgment found against a defendant in an action for damages for personal injuries suffered by the plaintiff through the defendant's default, the law presumes that every fact necessary to sustain the judgment was found against the defendant.

**Negligence—Falling of Lumber—Contributory Negligence.**—In an action for damages for personal injuries suffered by the plaintiff through the falling upon her of the defendant's lumber, alleged to have been negligently piled, the fact that at the time of the accident the plaintiff was sitting on other lumber would not show such contributory negligence as ought to bar a recovery.

APPEAL from Sixth Judicial District, Sacramento County.

Thos. Conger for respondent; Alexander, Armstrong & Hinkson for appellant.

BELCHER, J.—This is an action to recover damages for an injury received by the plaintiff from the falling upon her of a pile of lumber alleged to have been negligently and insecurely piled by the defendant in a public alley in the city of Sacramento.

The case was tried by the court and judgment, without written findings, rendered for the plaintiff. The defendant moved for a new trial and his motion was denied.

The law presumes that every fact necessary to sustain the judgment was found against the defendant.

The principal questions involved were whether the defendant had a right, under the circumstances shown in the case, to pile the lumber in the alley, and if he had, whether he piled it up in a secure or careless manner, and whether the plaintiff's negligence contributed to the injury.

On the whole we cannot say that the court erred in finding upon these questions against the defendant. The lumber had been recently piled up preparatory to its being removed into the defendant's lumber yard. It does not appear that there

was any interference with it after it was piled up, so as to make it more insecure than it otherwise would have been, nor does it appear that the plaintiff in any way caused it to fall. She was sitting near it upon other lumber, but there is nothing to show that she had, or had any occasion to have, any apprehensions of its falling.

The fact that she was sitting upon the other lumber, and that she would not have been injured if she had not been there, does not show such contributory negligence as to demand a reversal of the judgment on that account.

Judgment and order affirmed.

We concur: Crockett, J.; Niles, J.; Wallace, C. J.; Rhodes, J.

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JESSUP BLAIR, Respondent, v. JAMES SHERRY, Appellant.

No. 2848; July 9, 1872.

**San Francisco—Compromise of Claims to Real Estate.**—The purpose of the legislative "Act to authorize the commissioners of the funded debt of the city of San Francisco to compromise claims to real estate and to convey such real estate pursuant thereto" was to make good certain doubtful titles, and it was to have effect only in favor of persons who, by themselves, their tenants, or their grantors, had held actual possession of the parcels of land claimed by them from a time prior to the first day of January, 1855.

**San Francisco—Compromise of Claims to Real Estate.**—A person invoking the benefit of the legislative "Act to authorize the commissioners of the funded debt of the city of San Francisco to compromise claims to real estate and to convey such real estate pursuant thereto" was required to state the fact of his possession in his petition and establish it by testimony before the commissioners, and it was recited in the deed, after which the deed became prima facie evidence of the truth of the recitals in it.

**San Francisco—Compromise of Claims to Real Estate.**—The prima facie character, as evidence, of a deed from the commissioners under the legislative "Act to authorize the commissioners of the funded debt of the city of San Francisco to compromise claims to real estate and to convey such real estate pursuant thereto," may be met and overcome by testimony.

APPEAL from Fourth Judicial District, San Francisco County.

Winans & Belknap for respondent; N. Bennett and J. W. Thorne for appellant.

BELCHER, J.—This is an action of ejectment to recover the possession of a lot in the city of San Francisco.

The plaintiffs claim title to the demanded premises under a deed executed to them in pursuance of the provisions of the act of April 14, 1862, entitled "An act to authorize the commissioners of the funded debt of the city of San Francisco to compromise and settle certain claims to real estate, and to convey such real estate pursuant thereto."

By the terms of that act persons claiming its benefits were required to present a petition to the commissioners of the funded debt, setting forth, among other things, that they, by themselves, their tenants or the persons through whom they claim or derive possession, have been from and including the first day of January, 1855, and still are in the actual possession of the land for which they ask a grant. The commissioners were then required to take testimony as to the matters alleged in the petition, and upon its completion, if in their judgment the claim was well founded, to enter an order in their minutes adjudging and awarding to the petitioner a grant of the land petitioned for.

Upon the award becoming final, after notice published and payments made, as in the act provided, the commissioners were to execute a deed to the petitioner, conveying to him, his heirs and assigns, all of the interest of the city and county of San Francisco, and of the commissioners of the funded debt in and to such land.

The act then provides: "Such deed of conveyance shall contain recitals showing that the same was executed under the provisions of this act, and when the same shall contain recitals showing that all the provisions of this act have been regularly complied with, such deed of conveyance shall be deemed prima facie evidence of such facts so recited. . . . . No conveyance of any such land, made as hereinbefore provided, shall be deemed to conclude the rights of third persons; but such third persons may have their action in the premises to deter-

mine alleged interest in such lands against such grantee, his heirs and assigns, to which they may deem themselves entitled, either in law or equity."

The deed to the plaintiffs contained all the recitals contemplated in the act, and among others a recital of the presentation of "their petition in due form to said parties of the first part, commissioners as aforesaid, claiming and alleging that the said parties of the second part, by themselves and their tenants and those under whom they derive possession, have been from and including the first day of January, A. D. 1855, and still are in the actual possession of the premises hereinafter described."

At the trial the plaintiffs offered their deed in evidence without further proof as to the facts therein recited.

When the plaintiffs rested the defendants offered to prove "that neither the plaintiffs nor any of them, nor their predecessors, grantors, nor persons from whom they claim or derive title, or any of them, were ever in possession of the lot in controversy, or of any part thereof, either actually or constructively, that they had no such possession on or previous to the first day of January, 1855, or at any time between that date and the twentieth day of June, 1855, or since; that one John Rowland, in the year 1854, took actual possession of this lot in controversy, built a house upon it, and inclosed it with a good and substantial fence; that afterward, in the year 1854, he sold and transferred his possession of this house and lot to James Sherry, one of the defendants in this suit, for a valuable consideration, to wit, several hundred dollars paid to said Rowland; that Sherry, immediately upon the purchase, took possession of the said house and lot, and went there to reside, that he resided upon and had the actual possession of this lot on the first day of January, 1855, and so continued down to and including the twentieth day of June, 1855, and that said Sherry, by himself and his tenants, has occupied and possessed said house and lot from that time down to the present, and that during all that time the said Sherry has had actual, positive, notorious, undisturbed and peaceable possession of this whole lot. That such possession of the said premises was so held by said Sherry at the time of said plaintiff's making application to the commissioners of the funded debt of the city of San Francisco, at the time of filing the petition,

and during the proceedings taken and had by the commissioners, and at the time of the execution of the commissioners' deed to these plaintiffs, and during, down to and through the entire proceedings, from the time of the presentation of the petition to the said commissioners to the execution of their deed, and from thence till now."

The plaintiffs objected to the testimony as irrelevant and immaterial, and tending to impeach and contradict collaterally the fund commissioners' deed to them. The court sustained the objection and excluded the testimony.

In this we think the court erred. The purpose of the act, as declared in its preamble, was to make good certain doubtful titles claimed under the Van Ness ordinance and the act of 1858 confirming that ordinance. It was to have effect only in favor of those persons who, by themselves, their tenants, or their grantors, had held the actual possession of the parcels of land claimed by them from a time prior to the first day of January, 1855. This fact of possession was to be stated in the petition, established by testimony before the commissioners, and recited in the deed. All this being done, the deed became prima facie evidence of the truth of the facts recited. This prima facie evidence, however, may be met and overcome by opposing testimony. And we think it may be done in this action as well as in a new action commenced by the defendant for that purpose. If the facts set forth in defendants' answer be true, then he is one of the third persons named in the act, whose rights are not concluded by the conveyance to the plaintiffs.

Judgment and order reversed and cause remanded.

We concur: Niles, J.; Wallace, C. J.; Rhodes, J.; Crockett, J.

PEOPLE, Respondent, v. HENRY WILLIAMSON and CERTAIN REAL ESTATE, Appellant.

No. 2862; July 11, 1872.

**Taxes—Action to Enforce—Service of Summons.**—In an action for the collection of delinquent taxes, the judgment for the plaintiff will not affect both the personal defendant and the real estate assessed unless the summons has been served upon both.

**Taxes—Misdescription of Land.**—In an Action for the Collection of delinquent taxes, a defense based on misdescription of the land in the assessment is not good if claimed merely because of a defect in metes and bounds set forth, provided it is accurate as to the location and township where the land is situate, the number of acres, and the description by common designation or name.

**Taxes—Payment by One as Payment for Others.**—It may well happen that several persons may be assessed for a possession of, interest in, or claim to the same land, and when such is the case the payment by one would not operate as a payment for another.

APPEAL from Third Judicial District, Alameda County.

Attorney General for respondent; John Reynolds for appellant.

BELCHER, J.—This is an action for the collection of delinquent taxes. Judgment having been rendered against the personal defendant and the real estate, the personal defendant moved for a new trial, which was denied, and both defendants have appealed.

1. The summons does not appear to have been served on the real estate, and it not having appeared in the action, no judgment could be rendered against it.

2. It is claimed that the assessment was invalid, because the real estate was insufficiently described. The description, as found in the assessment-roll is as follows: "Interest in tract of land bounded North by land of McKay and county line; S. by Gordonices Creek; E. by T. lots Nos. 87 and 89 and land claimed by Young; W. by San Pablo Road and land of McKay, said interest amounting to 450 acres more or less, and being a portion of Domingo Peralta Reserve, commonly known as the 'Ford Ranch.'" The assessment-roll also

names the township and county where the land is situated, and the evidence shows that the whole tract described contains about one thousand acres.

As we understand the description of the land assessed it is this: That interest in the Domingo Peralto Reserve which is commonly known as the Ford Ranch and which contains four hundred and fifty acres more or less, and is within the general tract described by metes and bounds. If this reading is correct, the description is clearly sufficient. We have the location and township where the land is situate, the number of acres, and a description by common designation or name. This is all that the law (Revenue Act 1861, sec. 20) requires.

3. It is also claimed that a larger tract of fifteen hundred or eighteen hundred acres, but embracing the one thousand acres already spoken of, was assessed for the same year to Carpentier and Adams—to each an undivided one-half—and that Carpentier having paid the taxes assessed upon his half before the commencement of this action, his payment should operate as a payment pro tanto upon the four hundred and fifty acres assessed to the defendants.

The record does not contain a description of the land assessed to Carpentier and Adams nor the values placed thereon, but from the fact that the tax assessed against Carpentier was one hundred and seventy-six dollars and against Adams two hundred and sixty-four dollars, while against Williamson it was four hundred and ninety-five dollars, we infer that Carpentier and Adams were assessed for a claim to or an interest in the larger area, and not for the land itself.

It has been repeatedly held by this court that under the Revenue Act of 1861 the "claim to," "possession of," or "right of possession to" any land in this state may be assessed to the claimant or possessor, even though he does not own the fee: People v. Shearer, 30 Cal. 661; People v. Black Diamond Coal Co., 37 Cal. 54.

It may well happen, therefore, that several persons may be assessed at the same time for a possession of, interest in, or claim to the same land, and when such is the case, the payment by one would not operate as a payment for another.

If we are right in what has been said, the assessment against Williamson was a good assessment and the payment

by Carpentier did not operate as a payment pro tanto in his behalf.

We see nothing in the other points.

The judgment against the real estate is reversed, and the judgment and order against the personal defendant are affirmed.

We concur: Rhodes, J.; Crockett, J.; Niles, J.; Wallace, C. J.

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ROBERT TUCKER, Respondent, v. STEPHEN COOPER, Appellant.

No. 2643; July 11, 1872.

**Swamp Land—Application for Purchase.—The Taking of a Single Step,** of many required, by one who would succeed as an applicant for the purchase of swamp lands under the statute, is not sufficient as evidence that such applicant was successful.

**Swamp Land—Rival Applications.—An Appeal may not be Taken,** on the point of sufficiency of evidence, directly from an adjudication by the court to which the surveyor general referred rival applications to purchase swamp land, but, just as in other cases, only from an order of court upon a motion made on that ground for a new trial.

APPEAL from Tenth Judicial District, Colusa County.

This was a reference to the district court by the surveyor general for an adjudication between two rival applications for the purchase of the one tract of swamp land. The complaint contained all the essential averments. The answer admitted the plaintiff's application had been in due form, also his affidavits, and that his application had been made previously to the defendant's, but denied the truth of his affidavit required by the act of April 27, 1863; that the same was an evasion, for that the plaintiff was but a cover for one Ketchersides, who, in his own proper person, was ineligible as an applicant because of having previously entered six hundred and forty acres of swamp lands. The trial court found that the only evidence of such entry on the part of Ketchersides was a cer-

tified copy of the oath of loyalty taken by him, the taking of which oath was but one of several requirements under the act.

Belcher & Good for respondent; C. D. Semple for appellant.

RHODES, J.—It appears that the plaintiff made his application to purchase the land in controversy for the use of Ketchersides. The defendant contends that Ketchersides had previously entered six hundred and forty acres of swamp and overflowed land; and that, therefore, the plaintiff's application was illegal and void. The only evidence in the record that Ketchersides had entered such land is his affidavit of loyalty which was made in conformity with the act of April 27, 1863, and the official indorsements thereon. Such evidence tends to show an application to purchase, but does not show that the applicant had in fact entered the land.

In order to avoid any misapprehension as to a point of practice, it is proper to add that it does not clearly appear whether a motion for a new trial was made; and that if such motion was not made, and denied, and an appeal taken from that order, the question above noticed would not be entitled to consideration on this appeal.

Judgment affirmed.

We concur: Niles, J.; Belcher, J.; Wallace, C. J.

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HIRAM BAILEY, Respondent, v. ALMON WEYMOUTH, Appellant.

No. 2683; July 11, 1872.

**Forcible Entry and Detainer—Inclosure—Cultivation.**—In a proceeding for forcible entry and detainer the plaintiff need not prove that he has inclosed the premises, if he can prove that he has kept them continuously under cultivation.

**Forcible Entry and Detainer.—If A Attempts to Build a Dwelling** for himself on land occupied and cultivated by B, and responds to the remonstrances of B with such words as, "I intend to stay and defend my property and will defend it by force, if neces-

sary," and interferes with B's plowing the land, declaring his teams shall not pass unless over his body, and strikes B's mules over the nose and waves his hat in front of them to stop their progress, the facts are sufficient to justify proceedings by B against A, within the statute, for forcible detainer.

APPEAL from County Court, Alameda County.

Noble Hamilton for respondent; A. M. Crane for appellant.

BELCHER, J.—The complaint charges an unlawful entry and a forcible detainer under the second section of the act of April 2, 1866: Stats. 1865–66, p. 768.

The entry is alleged to have been made on the twenty-fourth day of June, 1870, upon a quarter section of land, parcel of a tract of from fifteen hundred to eighteen hundred acres claimed by the plaintiff.

The plaintiff had judgment and the defendant has appealed.

We think the plaintiff showed a possession sufficient to entitle him to maintain the action. The land was not inclosed, but the plaintiff had for four years cultivated in wheat nearly all of the larger tract and all of the smaller parcel in controversy. A fence is not essential to an actual possession: Ellicott v. Pearl, 10 Pet. (U. S.) 442, 9 L. Ed. 488. Adverse or prior possession may be established by proof of cultivation: Statute of Limitations, sec. 13; Polack v. McGrath, 32 Cal. 21.

We are also of the opinion that the evidence was sufficient to prove that the defendant detained "by force and with a strong hand or by menaces and threats of violence" at least so much of the land as he prevented the plaintiff from plowing.

When the defendant was building his house in June the plaintiff told him that he claimed the land and should try to put him off. Early in July the plaintiff went to the defendant and demanded that he give up possession and leave the premises, saying if he did not he should have to move or haul away his house. The defendant replied: "This you cannot do, unless you move me with it. I have come here and intend to stay here and defend my property." To the question how he intended to defend it he said "he should defend it by force, if necessary." Later in July the plain-

tiff was plowing the land near defendant's house, when he was stopped by the defendant, who stood in front of one of the teams and refused to let it pass, unless "over his body." Upon the team being urged forward, the defendant struck one of the mules upon the nose and swung his hat before them, thereby stopping their progress.

Several efforts were made by the plaintiff to plow around the house, which were resisted and stopped by the defendant. The plaintiff then gave up the contest and withdrew his teams to other parts of the field.

If all this does not constitute a forcible detainer within the meaning of the statute, it is difficult to see what would, without an actual breach of the peace.

We have not taken into the account the fact that the defendant served notice upon the plaintiff that he had settled upon and claimed the land as public land under the pre-emption laws of the United States, nor the fact that he testified he went upon it in good faith, believing it to be public land.

It did not appear on the trial that it was in fact public land, nor if it was, whether it was surveyed or unsurveyed, nor whether the defendant was or was not a qualified pre-emptor.

All this might have been proved, perhaps for the purpose of showing that the defendant's entry was made in good faith, and in the belief that he had a legal right to enter, and that it was not, therefore, an unlawful entry within the meaning of the statute: Shelby v. Houston, 38 Cal. 422.

On the whole, we think the judgment should be affirmed, and it is so ordered.

We concur: Niles, J.; Wallace, C. J.

I dissent: Rhodes, J.

February 21, 1874.

By the COURT.—The defendant's motion for a nonsuit should have been granted, on the ground that the evidence failed to make out a case either of forcible entry or forcible detainer.

Judgment reversed and cause remanded for a new trial.

## HENRY CONNELLY, Appellant, v. MON CHUNG, Respondent.

No. 2923; July 11, 1872.

**Tide Land—Reclamation.—A Patent for Land, Although Purporting** to have been issued under the state act of April 21, 1858, for the sale and reclamation of swamp and overflowed lands, was, whether made before or after the act of May 14, 1861, which refers to reclamable tide lands, ineffectual to pass any title if the subject of the patent was tide land incapable of reclamation.

**Public Land.—A Patent for Land Issued Without Authority** is open to collateral attack in an action of ejectment.

APPEAL from Seventh Judicial District, Solano County.

G. S. Hilborn for appellant; M. A. Wheaton for respondent.

BELCHER, J.—The action is ejectment to recover the possession of a lot of land described as lot 2 of block 280, in the city of Vallejo. At the trial the plaintiff deraigned title to the demanded premises under a patent from the state of California purporting to convey twenty-five and eighty-eight hundredths acres "of state tide lands," bounded on one side by a line drawn along the "bank" of Napa bay, and on the other by "the line of low-water mark at spring tide," and having a width at one end of three and forty-five hundredths chains and at the other of four and seventeen hundredths chains.

The patent bore date April 3, 1863, and purported to have been issued under the provisions of the act of the legislature of the 21st of April, 1858, entitled "An act providing for the sale and reclamation of the swamp and overflowed lands of this state." The plaintiff also proved that the lot in question was tide land situate between the lines of ordinary high and low tides.

No testimony being offered on the part of the defendant, the court r ..dered judgment against the plaintiff on the ground that he had failed to show any legal right or title to the premises sought to be recovered.

The appeal is from the judgment and from an order denying the plaintiff's motion for a new trial.

The appellant insists: first, that the act of the 21st of April, 1858, authorized the officers, who were charged with the duty of selling and conveying the state's lands, to sell and convey the particular lands described in the patent; second, that if that act did not authorize the sale of these lands, still that the sale was ratified and confirmed by the act of the 14th of May, 1861, entitled "An act to provide for the sale of the marsh and tide lands of this state," or if made after the date of that act, that it was authorized by it; and third, that the defendant, having failed to show himself in privity with the source of title to the lands, cannot be heard to contest the validity of the patent.

In People v. Morrill, 26 Cal. 336, a patent had been issued by the state for one hundred and sixty acres of land described as state tide lands and situated in part upon the sea beach between the lines of high and low water mark and in part under the waters of the ocean. The patent purported to have been issued under the act of April 21, 1858, and it was claimed in that case, as in this, that the sale and patent were authorized by that act, and if not by that act, then by the act of May 14, 1861. After a very full and exhaustive consideration of the scope and effect of both acts it was held by the court that nothing was offered for sale by the former act, except the swamp and overflowed lands which the state holds under the grant by Congress of September 28, 1850, and such channels of greater or less width, through which the tide ebbs and flows, as are found threading the lands denominated "salt marsh" lands. It was also held that the act of May 14, 1861, authorized the sale only of such tide lands as are capable of reclamation, and not such as are irreclaimable in character.

By its terms the act ratified and confirmed the sales of all marsh and tide lands that had been made in accordance with the provisions of any of the acts of the legislature providing for the sale of the swamp and overflowed lands belonging to the state, and authorized sales of such lands to be made thereafter. As the sale under consideration by the court in that case was unquestionably made after the passage of the act, it was held not to fall within the class of sales which the act was intended to ratify. The language, however, used by the court was as applicable to the one class as the other.

In this case it does not appear at what time prior to the issuance of the patent in April, 1863, the sale was made, but whether made before or after the passage of the act of 1861, if the land was tide land incapable of reclamation, we must hold, under the authority of People v. Morrill, supra, that the attempted sale of it was ineffectual to pass to the patentee any title.

It is already seen that the lot in controversy lies between ordinary high and low water mark, and that the whole land covered by the patent is a narrow strip situated on the margin of Napa bay, having one of its sides bounded by a line drawn along the "bank" of the bay and the other by the line of low-water mark at spring tide.

Tide lands are not reclaimable, within the meaning of the word as used in People v. Morrill, because they may be filled in till the surface is raised above the water, and they are thus made available. Such lands are called "made lands" and not "reclaimed lands."

It is apparent, we think, that the act of 1858 did not authorize the sale of the lot in controversy, and that being between ordinary high and low water mark, it was not capable of reclamation, and, therefore, the sale of it was not ratified or authorized by the act of 1861.

If this be so, the patent as to this lot at least was issued without authority, and may be attacked collaterally in an action of ejectment: Doe v. Winn, 11 Wheat. (U. S.) 380, 6 L. Ed. 500; Doll v. Meador, 16 Cal. 324.

Judgment and order affirmed.

We concur: Crockett, J.; Niles, J.; Rhodes, J.; Wallace, C. J.

## MICHAEL RYAN, Respondent, v. MOSES SMITH, Appellant.

No. 3092; September 14, 1872.

**Ejectment—Admission in Answer.**—In Ejectment an answer that denies entry by the defendant upon the land described in the complaint "except two hundred and fifty feet lying," etc., by this exception admits an entry which the plaintiff is at liberty to treat as an ouster.

**Ejectment—Injunction Against Trespassers.**—It is not usual, if indeed proper, for a judgment in ejectment to be accompanied with a perpetual injunction against trespassers.

APPEAL from Eleventh Judicial District, El Dorado County.

Geo. A. Blanchard for respondent; Geo. E. Williams for appellant.

BELCHER, J.—The contest in this case was in reference to the ownership of a parcel of mining ground, four hundred feet long by two hundred and fifty feet wide. The complaint alleged ownership in the plaintiff since 1860, and that in September, 1870, the defendant entered upon the ground and ousted the plaintiff from the possession thereof, and committed certain acts of trespass thereon. The prayer was for damages and an injunction, and that it be adjudged that plaintiff was the owner and entitled to the possession of the ground and every part thereof. The answer denied the plaintiff's ownership and set up title in the defendant. The court found that the plaintiff had owned all the ground since 1860, except the south seventy by four hundred feet, but that the defendant in 1864 attempted to locate it all, and had since claimed to own it. It was also found that the defendant did not in 1870 enter upon the part belonging to the plaintiff, or commit any acts of trespass thereon. It was adjudged that the plaintiff was the owner and entitled to the possession of all the ground found to be his, and that the defendant, his agents, etc., be perpetually enjoined from mining upon the same, or committing acts of waste thereon, and that the plaintiff recover his costs.

The appeal is upon the judgment-roll, and it is claimed that upon the findings the judgment should have been for the defendant.

The character of the action is not very distinctly marked, but counsel treat it as an action of ejectment, and we shall also so treat it.

The answer in effect admitted that the defendant, in September, 1870, entered upon and took possession of the parcel of land in dispute, by denying that he entered upon or took possession of any part of the land claimed by the plaintiff, "except the two hundred and fifty feet lying immediately north of and adjoining the said middle fence. Said parcel of ground last described being four hundred feet in width from east to west and two hundred and fifty feet from north to south."

This entry the plaintiff was at liberty to treat as an ouster of himself for the purposes of the action, and no proof upon the subject was required. The finding that the defendant did not enter upon or oust the plaintiff from the part belonging to him may, therefore, be disregarded.

It is not usual for a judgment in ejectment to be accompanied by a perpetual injunction against trespassers; and if it is ever proper, we see no occasion for it in this case.

The respective rights of the parties being determined, there is no reason to suppose that either will attempt to trespass upon the other.

We think the judgment should be reversed in so far as it decrees a perpetual injunction against the defendant, and that in all other respects it should be affirmed, but without costs.

And it is so ordered.

We concur: Rhodes, J.; Wallace, C. J.; Niles, J.; Crockett, J.

## W. H. H. COPP, Appellant, v. W. P. HARRINGTON, Jr., Respondent.

No. 2842; September 14, 1872.

**State Lands—Improvements.—An Application for the Purchase** of lands from the state, under the act of 1868, was required to state that there were at the time no improvements on the land applied for other than such as were owned by the applicant.

**State Lands—Application for Purchase—Verification.**—The facts required to be stated, on application for a certificate of purchase of state lands under the act of 1868, the law intended should be stated under oath.

**State Lands—Curative Act.—Where an Application for the Purchase** of land from the state, under the act of 1868, was defective in failing to state that no improvements other than those of the applicant were on the land and also in failing to have all its statements made under oath, it became valid nevertheless by the curative act of 1870 in all cases where there were not two or more claimants to the land and where there was no conflict between claimants.

**State Lands.—The Act of 1870, Curing Defects in Applications** for the purchase of state lands under the law of 1868, did not make the application any better or give it any higher grade or character than it would have possessed had it conformed to the law at the time it was filed.

**State Lands—Contest After Purchase.—The Act of 1868,** regulating the proceedings necessary in the purchase of state lands, does not place a purchaser beyond reach of a contest after being given his certificate of purchase.

**State Lands—Purchase.—There is a Clerical Error in the Act of** 1868 where it is said, "Whenever any resident of the state desires to purchase any of the other lands mentioned in section 52 of this act," the mention being intended to be in section 51.

**State Lands—Who may Contest Purchase.**—The statute of 1868, regulating the proceedings necessary in acquiring lands from the state, does not contemplate that a contest may be brought before the surveyor general or register by any person who may choose to interfere, but provides for a contest between conflicting claimants of the land or of the right to purchase and to acquire the title.

**State Lands—Contest of Claims.—When One Comes Before the Surveyor General,** having himself a defective application for the purchase of lands under the law of 1868, for the purpose of contesting the claim of another to the same lands, such application should not be recognized as raising a contest.

APPEAL from Sixth Judicial District, Yolo County.

L. J. Ashford for appellant; Belcher & Belcher for respondent.

See Copp v. Harrington, 47 Cal. 236.

RHODES, J.—The defendant applied to the surveyor general, in December, 1869, to purchase the lands in controversy —they being portions of section 10, township 12 north, range 1 west—in lieu of certain portions of sixteenth sections. The application was made under the act of March 28, 1868 (Stats. 1867–68, p. 507), and it was approved in April, 1870; and the defendant, having made part payment for the land, as required by law, the register, on the 14th of April, 1870, issued to him a certificate of purchase.

On the 30th of April, 1870, the plaintiff made his application for the purchase of the same lands, in lieu of the school lands mentioned in the defendant's application; but the surveyor general refused to approve the application, and entered an order referring the contest between the plaintiff and defendant, as to their respective rights to purchase the land, to the proper district court for trial. The defendant had judgment, and the plaintiff appeals.

The defendant's application to purchase failed to state whether there were any improvements on the land other than those of his own, and a part of the facts required to be stated were set forth in an unverified statement. For these reasons the application was fatally defective, as we held in Hildebrand v. Stewart, January Term, 1870. On the 24th of March, 1870, a certain act was passed (Stats. 1869–70, p. 352), by which it was provided that all applications under the act of March 28, 1868, theretofore made, "where there are not two or more applicants for the purchase of the same land, or conflicts between claimants, shall be held good and valid," though not made in conformity with said act of 1868. There were neither two or more claimants for the purchase of the lands, nor was there any conflict between claimants to the lands, at the time when the act of 1870 took effect—the date of its passage. The defendant's application was thereby rendered as valid and effectual for all purposes as it would have been had it strictly conformed to the provisions of the act of 1858.

The act did not insert into the application the omitted facts, but it declared that the application, as it then stood, should be valid both in form and substance; and it became the duty of the surveyor general to approve the selection and location of the lands, unless there were other objections than were found in the application. But the act did not make the application any better, or give it any higher grade or character than it would have possessed had it conformed to the law at the time it was filed. It did not place the applicant beyond the reach of a contest, nor did it, in case of a contest, waive the proof of any fact which would be required to be established under the act of 1868.

The statute of 1868, as we construe it, does not place a purchaser, who has procured a certificate of purchase, beyond the reach of a contest. The seventeenth section of the act makes provision for a contest "concerning the approval of a survey or location . . . . and concerning a certificate of purchase, or other evidence of title." The only other evidence of title is a patent. It is also provided by section 5 that a notice shall be published when a patent is about to be issued, and that a protest may be filed against the issuing of the patent; and this shows that a contest may be initiated at that stage of the proceedings.

The plaintiff bases his point that the act of 1868 makes no provision for the purchase of lands selected in lieu of the sections 16 and 36 upon the language of section 53. The portion of the section referred to is as follows: "Whenever any resident of the state desires to purchase any of the other lands mentioned in section 52 of this act, except the sixteenth and thirty-sixth sections, he or she shall make an affidavit," etc. The reference to the section by its number is clearly a clerical error. The fifty-first section was intended. The fifty-second section mentions only land in sections 16 and 36; while section fifty-one speaks of all classes of school lands, and lands selected in lieu of sections 16 and 36. The act also contains many provisions in relation to the selection, survey, sale and conveyance of lieu lands.

The statute does not contemplate that a contest may be brought on before the surveyor general or register by any person who may choose to interfere; but the statute provides for a contest between conflicting claimants of the land or of the

right to purchase and acquire the title to it. The question of the right of the applicant to have his survey or location approved, or to purchase the land or to have a patent issue, is exclusively between him and the state, unless another person holds some right or title in or to the land, or has the right to purchase it; and such person must show that he possesses such right or title, or right to make a purchase of the land, or he will have no standing in a contest before the surveyor general or register, or in the court to which the contest is referred. The contestant—here the plaintiff—presented a defective application for the purchase of the land. His application seems to have been drawn under the provisions of section 52, instead of section 53, as it should have been; and he omitted to state that there were no improvements on the land, other than those of his own. For this reason the surveyor general should not have recognized plaintiff's application as raising a contest; and the court below, to whom the alleged contest was referred, should have dismissed the action.

The judgment for the defendant may be regarded as accomplishing the same result, so far as the action is concerned, and therefore the judgment is affirmed.

We concur: Wallace, C. J.; Niles, J.; Crockett, J.

Mr. Justice Belcher, being disqualified, did not participate in this decision.

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CHRISTIAN J. MEGERLE, Respondent, v. RICHARD P. ASHE et al., Appellants.

No. 1635; September 16, 1872.

**Public Land—Declaratory Statement—Failure of Pre-emptor to File.**—The failure by a pre-emptor, having the requisite qualifications as such and living on the land, to file his declaratory statement in season would not, where there is no rival claimant to the land, disable him from becoming a pre-emptor de novo.

APPEAL from Fifth Judicial District, San Joaquin County.

G. W. Tyler for respondent; Patterson, Wallace & Stow for appellants.

See Megerle v. Ashe, ante, p. 659, 33 Cal. 74; 47 Cal. 632.

BELCHER, J.—The plaintiff claims title under a patent issued to him by the United States, and the defendants claim under a patent issued to David S. Terry by the state of California.

The facts, so far as material, are substantially as follows:

The plaintiff settled upon the quarter section of land in controversy in 1850, and continued to reside there with his family until 1860, when he was forced to leave by high water. Prior to that time he had entered the quarter section in the proper United States land office and obtained a certificate of purchase therefor. The township including the land in question was surveyed in the field in May and June, 1855, and the plat of survey, properly certified by the surveyor general, was forwarded to the office of the register at Marysville on the fourth day of December, 1855, and received in that office on the fifth day of the same month. No notice of the return of the plat was given until the 15th of February, 1856, when a notice was published in a Marysville newspaper by the officers of the Marysville land office, notifying settlers in the township that it was necessary for them to file their declaratory statements on or before the fifteenth day of May, 1856. On the 16th of April, 1856, the plaintiff filed his declaratory statement in the register's office, and on the 28th of May, 1860, proved up and entered, and paid for his claim with a soldier's bounty land warrant. In pursuance of, and to give effect to, the plaintiff's entry the United States issued to him a patent for the land bearing date on the first day of September, 1863.

At the time of the plaintiff's settlement and entry he was a qualified pre-emptor under the laws of the United States. On the 14th of May, 1856, Terry, as the agent of the state, selected the quarter section in question in part satisfaction of the grant of five hundred thousand acres of the public lands, made by Congress to the state by the act of September 4, 1841, and on that day located thereon in the proper United States land office a state school land warrant. In pur-

suance of this selection and location the state of California issued to Terry its patent for the land, bearing date on the eighth day of January, 1862.

It is thus seen that defendant's title had its inception on the 14th of May, 1856, twenty-eight days after the plaintiff filed his declaratory statement in the land office.

Very much of the labor in the case, both in the court below and in this court, has been expended upon the question whether the township plat is to be deemed to have been "returned" to the land office on the 5th of December, 1855, when it was received there, or not till the fifteenth day of February following, when notice to the settlers was published by the register and receiver.

This question was deemed material, upon the theory that if the plaintiff failed to file his declaratory statement within three months after the return of the plat, he lost all right ever to file one upon this land, and hence the land was open and subject to selection by the state when its attempted selection was made. With the views we now entertain of the case, this question becomes comparatively immaterial.

As already seen, the plaintiff did file his declaratory statement on the 16th of April, 1856. At that time he was a qualified pre-emptor, was living on the land, and there was no adverse claim to it. If he failed to file within three months after the plat was returned to the land office, his pre-emption right did not by relation date back to the time of his settlement, but the law did not forbid his exercising a new pre-emption right as of that date. The land was free from all claims, and the law invited its settlement and pre-emption by anyone having the necessary qualifications. No reason is found, either in the letter or spirit of the law, why the plaintiff could not accept that invitation.

Such has been the construction given to the law by the officers of the land department (Lester's Land Law, No. 458, p. 404, and No. 475, p. 418), and such is the construction given by the supreme court of the United States: Johnson et al. v. Towsley [13 Wall. 72, 20 L. Ed. 485], decided at the December Term, 1871. In this case, speaking of the fifth section of the act of 1843, the court say: "The record shows undoubtedly that his settlement commenced about eight months before he filed his declaration, and it must be con-

ceded that the land was of that class which had not been proclaimed for sale, and his case must be governed by the provision of that section. It declares that when the party fails to make the declaration within the three months his claim is to be forfeited and the tract awarded to the next settler in order of time on the same tract, who shall have given such notice, and otherwise complied with the conditions of the law. The words 'shall have given such notice' presuppose a case where some one has given such notice before the party who has thus neglected seeks to assert his right. If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before anyone else has initiated a right of pre-emption by declaration or settlement, we can see no purpose in forbidding him to make his declaration, or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying that if this is not done within three months, anyone else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or anyone else asserted claim to the land, or made a settlement, we think his right was not barred by that section under a sound construction of its meaning."

It follows that when the school land warrant was located the land was not subject to selection by the state and no title passed by the state's patent: Terry v. Mergerle, 24 Cal. 625, 85 Am. Dec. 84.

By the judgment the plaintiff recovered the whole quarter section as against all of the defendants. The defendant Ashe was not served with summons and did not appear in the action. No testimony was introduced showing possession by any of the defendants, but Van Syckle and Flanders by their answer admitted that they were in possession "of all of the said premises except about eight acres thereof situated in the southwest corner of said northwest quarter of said section 21, which said eight acre tract is bounded on the

south by the southerly line of said northwest quarter and west by the westerly line of said northwest quarter, and which said eight acres is in the occupancy of the plaintiff." Clearly as to this eight acres, the plaintiff was not entitled to judgment.

Upon the other points we are satisfied with the opinion already filed on this appeal.

It follows that the judgment against Ashe must be reversed, and the judgment against the other defendants must be modified so as not to include the eight acres not in their possession. Judgment to be entered as of January 4, 1871, and it is so ordered.

We concur: Niles, J.; Crockett, J.; Rhodes, J.

The chief justice, having been of counsel, did not sit in this cause.

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## PEOPLE ex rel. A. P. OVERTON, Respondent, v. W. B. ATTERBURY, Appellant.

No. 3187; October 17, 1872.

**Escheat—Aliens—Special Act Removing Disability.**—A proceeding instituted by the attorney general to have lands of a deceased person escheat by reason of alienage of the heirs is extinguished by a special act of the legislature, passed during its process, removing the disability.

APPEAL from Fourth Judicial District, San Francisco County.

Attorney General, W. W. Pendergast and Butts & Wise for respondent; Lattimer & McCullough for appellant.

BELCHER, J.—This action was commenced by the attorney general for the purpose of having it determined that certain property belonging to the estate of Thomas Spriggs, deceased, had escheated to the state.

After the case was brought to this court the legislature, by a special act (Acts 1871–72, p. 621), removed the disability

by reason of alienage of the heirs or next of kin of Thomas Spriggs to inherit his estate, and released to them "all the right, title and interest that the state of California has or may have in or to said estate or any part thereof."

It is therefore ordered that the appeal be dismissed.

We concur: Crockett, J.; Niles, J.; Rhodes, J.; Wallace, C. J.

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SAMUEL SOULE, Respondent, v. FULTON G. BERRY, Appellant.

No. 3442; November 2, 1872.

**Appeal—Conflicting Evidence.—On Appeal from an Order Granting a New Trial,** based partly on the ground that the verdict was against the evidence, the action of the trial court will not be interfered with even although there was a substantial conflict of evidence at the trial.

APPEAL from Fifteenth Judicial District, San Francisco County.

J. M. Seawell for respondent; R. A. Redman for appellant.

PER CURIAM.—The order of the court below granting a new trial proceeded in part upon the ground that the verdict was against the evidence. The most favorable view for the appellant which can be taken here is that there is a substantial conflict in the evidence, and in such a case we cannot interfere with the action of the court.

Order affirmed.

JAMES A. BLOOD, Respondent, v. JOHN C. FAIRBANKS, Appellant.

No. 3280; November 13, 1872.

**Partnership—Dissolution by Sale of Partner's Interest.**—If a partner, without the consent of his copartner, sells his interest to a third person, the sale dissolves the partnership.

**Partnership—If a Partner Sells His Interest in the Firm to an Outside** person, the remedy of a nonassenting copartner is not against the purchaser but the seller, who may be made to respond in a suit in equity for an accounting.

APPEAL from First Judicial District, Santa Barbara County.

Fernald & Richards for respondent; Chas. E. Huse for appellant.

See Blood v. Fairbanks, 48 Cal. 171; 50 Cal. 420.

PER CURIAM.—The plaintiff has mistaken his remedy. Though it is alleged in the complaint that Fairbanks succeeded in effecting a purchase of the interest of Hewitt through the false representation made to the latter that Blood had already sold, yet as Hewitt does not appear to complain of the fraud, the sale of his interest to Fairbanks was valid to operate a dissolution of the copartnership which, it is conceded, had theretofore existed between Blood and Hewitt under their contract with Fairbanks, and the latter having taken possession of the subject matter of the copartnership, the remedy of Blood is in equity and for an accounting, as in other cases in which an existing copartnership is terminated by the sale of all the interest of one of the copartners in the assets of the firm; and in such a proceeding Hewitt would be a necessary party.

Judgment reversed and cause remanded, with directions to dismiss the action.

## AH MOUIE, Respondent, v. BURNS and CARPENTER, Appellants.

No. 3458; November 15, 1872.

**New Trial—New Evidence Merely Cumulative.**—A motion for a new trial, based on alleged newly discovered evidence is properly denied when from the accompanying affidavits it appears that the evidence newly discovered is only cumulative.

APPEAL from Seventeenth Judicial District, Los Angeles County.

O. Melveney & Hazard for respondent; McConnell & King for appellants.

PER CURIAM.—One of the principal questions at the trial—if not the only question—was as to the ownership of the money and watch taken from the person of the plaintiff at the jail. The finding of the court was in favor of the plaintiff, and the motion for a new trial was based wholly upon alleged newly discovered evidence—that set forth in the affidavit of Dye. Upon looking into that affidavit, we think that it is merely cumulative in its character, and that the motion for a new trial was properly denied.

Judgment and order denying new trial affirmed.

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## M. LAVENSOHN and J. B. GALLAND, Appellants, v. LOOMIS WARD and H. P. WHIPPLE, Respondents.

No. 3452; November 19, 1872.

**Crops—Conflicting Liens.**—The Lien of a Mortgagee of a crop, taken with notice that a creditor of the owners has already been given possession of it to gather and apply upon his debt, is inferior to his lien.

**Replevin.**—In Replevin the Subject Matter of the Action is Confined to specific property mentioned in the complaint, and the defendant may not introduce in his answer another subject matter

referring to other property, even if thereby it appears that he has a right to recover such other property in a separate action.

APPEAL from Second Judicial District, Tehama County.

P. B. Nagle for appellants; Chadbourne & Lewis for respondents.

Per CURIAM.—We are of opinion that when Ward received the possession of the growing crops, under an agreement with the owner that he should gather them and apply them to the payment of the debt due to him, he thereby acquired a lien upon such crops and a right to their possession which was superior to that subsequently acquired by the plaintiffs under the mortgage of October 19th, taken, as it was, with notice of the rights of Ward. The judgment, however, which the defendant Ward obtained against the plaintiffs cannot be supported. The action is in replevin, and the subject matter of the litigation in such a case necessarily consists only of the property mentioned in the complaint, and it is not competent to the defendant by his answer to introduce a new and distinct subject matter of litigation by claiming of the plaintiff the return of other and distinct personal property, even though at present such a case as would have enabled him to recover in an independent action.

Judgment reversed and cause remanded, with directions to render judgment in favor of the defendant as to the property mentioned in the complaint and without regard to his counterclaim.

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DAVID UMBARGER, Respondent, v. PEDRO CHABOYA, Appellant.

No. 2691; November 21, 1872.

**Ejectment.—A Confirmation of Title by Decree of the United States** court could have no effect to change the boundaries of a tract of land to the detriment of one, not a party to the proceeding, owning land adjacent to that as to which the decree was made.

**Deed.—A Description in Part "Bounded on the East by the Lands** or ranchos of," etc., written in a deed, means the lands or

ranchos mentioned as they were understood by the parties to the deed at the time the latter was made.

APPEAL from Third Judicial District, Santa Clara County.

Thomas Bodley and Wm. Matthews for respondent; S. O. Houghton for appellant.

See Umbarger v. Chaboya, ante, p. 699; 49 Cal. 525.

By the COURT.—The true location of the eastern line of the land conveyed by the deed of December, 1850, from Pedro Chaboya to Jones and Eldridge was very important, as upon its location depended the question as to whether the defendants were in the occupation of the land conveyed by that deed.

The eastern line is, of course, that particular line which the parties to that deed had in mind when it was executed and delivered—"bounded on the east by the lands or ranchos of the Higueras and Antonio Chebello," as written in the deed, means, of course, those lands and ranchos as they were understood by the parties to exist in December, 1850, at the making of the deed.

The location of the western line of the Antonio Chaboya ranch subsequently made by the United States government, changing the western line of that ranch and throwing it some two miles and upward farther to the west, if such be the fact, could not operate to change the location of that line, as it was understood to exist in December, 1850, in such a sense as to alter or affect the descriptive calls and boundaries in the deed to Jones and Eldridge. If it could, then the deed to Jones, which was made with reference to objects and lines, as understood to exist in 1850, might be utterly changed and destroyed by the subsequent running of lines under the authority of the United States in confirming the title to the neighboring tract of Antonio Chaboya, in which tract Pedro Chaboya and Jones, who were parties to the deed of 1850, asserted no interest whatever.

The confirmation of the title of Antonio Chaboya to the rancho Yerba Buena cannot, of course, be called in question, nor his title, as confirmed, assailed in this action, and in hold-

ing, as we do, that the question of the location of the western line of that ranch, as it was understood to be in 1850, may be inquired into for the purposes of this action as fully as though the title of Antonio Chaboya had never been confirmed by the United States authorities at all, we do not depart from the established rule that the legal effect of the confirmation and patent of the Yerba Buena Rancho, subsequently obtained, operated to fix the Coyote creek as its true western boundary line.

We are of opinion, therefore, that the defendants should have been permitted to show by proof, if they could, what was considered to be the western line of the Rancho Yerba Buena in December, 1850, and in that connection to show that the diseño of Antonio Chaboya and the other papers connected therewith (and which were relied upon by the plaintiff to fix the Coyote creek as the western line of the Yerba Buena Ranch), were mere forgeries.

Judgment and order denying a new trial reversed and cause remanded for a new trial.

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## A. J. McLEOD, Appellant, v. WM. H. DAVIS and J. N. WORTH, Respondents.

No. 3365; November 22, 1872.

**Appeal.—A Party not Served With a Notice of Appeal is not** before the appellate court so that the appellant's rights as against him may be considered.

**Appeal.—On an Appeal on the Judgment-roll Alone,** there being no statement or bill of exceptions annexed, where an appeal from an order denying a new trial has been abandoned, the judgment is to be affirmed if the evidence justifies the findings.

APPEAL from Third Judicial District, Alameda County.

A. H. Griffith for appellant; B. B. Newman for respondents.

By the COURT.—We cannot consider whether there was error in not rendering judgment against Davis, inasmuch as he was not served with notice of appeal, and is, therefore, not before us.

Nor can we disturb the judgment rendered in favor of the other defendants. The appeal is on the judgment-roll alone, without a statement or bill of exceptions annexed thereto, the appeal taken from the order denying a new trial having been abandoned at the bar.

The findings, actual and implied, support the judgment rendered below.

Judgment affirmed.

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JOHN F. PENNY, Appellant, v. JOHN WIELAND, Respondent.

No. 3300; November 29, 1872.

**Appeal—Conflicting Evidence.—A Judgment Based on Findings on the point of prior possession made on evidence substantially conflicting will be allowed to stand.**

APPEAL from Fourth Judicial District, San Francisco County.

J. C. Bates for appellant; S. F. & L. Reynolds for respondent.

By the COURT.—No errors of law are insisted upon in the printed points. The only claim upon which the appellant bases his right to recover the possession of the premises is founded upon his alleged prior possession. Upon looking into the record we observe that the evidence as to that possession was conflicting within the rule which protects the finding implied in support of the judgment against him from being disturbed here.

Judgment and order denying new trial affirmed.

PEOPLE, Appellant, v. MATTHEW HARRINGTON, Respondent.

No. 3277; December 3, 1872.

**Homicide.—The Evidence of a Chinaman cannot be Admitted to Prove a white man guilty of manslaughter.**

APPEAL from Twelfth Judicial District, San Francisco County.

Attorney General and D. J. Murphy for appellant; George W. Tyler for respondent.

By the COURT.—The defendant, a white man, was indicted for the crime of manslaughter. Upon the trial a Chinese witness was called by the district attorney and excluded by the court on objections made by the defendant. The defendant being acquitted, the people bring this appeal and assign as error the ruling of the court refusing to allow the Chinese witness to testify.

Upon the authority of the People v. Brady, 40 Cal. 198, 6 Am. Rep. 604, and of the People v. McGuire (No. 3372), [45 Cal. 56], decided at the present term, the judgment is affirmed.

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PAUL ROUSSET, Appellant, v. ROBERT BOYLE, Respondent.

No. 3546; December 11, 1872.

**Appeal—Statement.—Upon an Appeal from an Order Which is not Based solely on affidavits, review will not be had unless a statement on appeal is annexed to the order.**

APPEAL from Fourth Judicial District, San Francisco County.

McAllister & Berger for appellant; Sharp & Lloyd for respondent.

See Rousset v. Boyle, 45 Cal. 64.

By the COURT.—The order sought to be reversed appears to have been made by the court below upon a consideration of its records and files as well as upon the affidavits presented. What these records and files were does not appear. There is no settled or certified statement on appeal from the order, and we have often reiterated that upon an appeal from an order, which is not based solely upon affidavits, we will not review it, unless a statement on appeal is annexed to the order. Some of the cases upon this point are: Haggin v. Clark, 28 Cal. 162; Leffingwell v. Griffing, 29 Cal. 192; Wetherbee v. Carroll, 33 Cal. 554; Cross v. Zane, at the present term.

Order affirmed.

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## S. P. PHARRIS, Respondent, v. WM. S. DOWNING, Appellant.

No. 2769; January 22, 1873.

**Pleading.—The Statute of Limitations, in Order to be Availed of as a defense, must have been pleaded.**

APPEAL from Twelfth Judicial District, San Mateo County.

A. Teague for respondent; H. A. Scofield for appellant.

By the COURT.—It appeared upon the argument had at the bar that the only point upon which reliance is placed to reverse the judgment is that the action is barred by the statute of limitations. It appears, however, upon looking into the record, that the statute is not pleaded.

Judgment affirmed.

## GEORGE HAGAR, Appellant, v. SUPERVISORS OF YOLO COUNTY, Respondents.

No. 2914; February 5, 1873.

**Certiorari—Scope of Writ.—In California the Only Office** of the writ of certiorari is to ascertain and determine whether the inferior tribunal to which it is directed has exceeded its jurisdiction in the proceeding sought to be reviewed.

**Swamp Land—Reclamation—Power of Supervisors.**—In the organization of swamp land reclamation districts the powers of boards of supervisors are determined in each case by the board's own record of the case, which record cannot be enlarged or aided by proof aliunde.

**Swamp Land—Reclamation—Requisites of Petition.**—The foundation of the jurisdiction of boards of supervisors in the matter of the organization of swamp land reclamation districts is a sufficient petition, the requisites of which are prescribed by statute.

**State Land—Sold and Unsold Lands.—The Records of the State Land Office** furnish the data for ascertaining with accuracy what lands have been sold and what unsold within any particular district, and in seeking to establish a new district this statutory requirement ought to be so complied with as to need no aid of presumption to supply deficiencies in the averments of the petition.

**Swamp Land—Reclamation—Mexican Grants.**—It is questionable whether, under existing statutes, lands held under Mexican grants can be included in swamp land reclamation districts, particularly if the land sought to be so included be not itself swamp land.

Certiorari, Yolo County.

Cadwalader & Belcher, for appellant.

See Hagar v. Board of Supervisors, 47 Cal. 222; 50 Cal. 473.

By the COURT.—It is sought in this case to review the action of the board of supervisors of Yolo county in its proceedings to establish "Reclamation District No. 108," organized for the purpose of reclaiming a large body of swamp and overflowed land situate in Yolo and Colusa counties. The only office of the writ of certiorari in this state is to ascertain and determine whether the inferior tribunal to which it is directed has exceeded its jurisdiction in the proceeding sought

to be reviewed. The only question, therefore, which is before us in this case is, whether the board of supervisors has regularly pursued its authority and kept within its jurisdiction in the proceedings under review.

The act of March 28, 1868 (Stats. 1867–68, p. 514), prescribes minutely the steps to be pursued in the organization of swamp land reclamation districts. Section 30 provides that: "Whenever the holders of certificates of purchase, patents or other evidence of title representing one-half or more of any body of swamp and overflowed, salt marsh or tide lands, susceptible of one mode of reclamation, desire to reclaim the same, they shall present to the board of supervisors of the county in which the said lands or the greater portion thereof are situated, at a regular meeting of said board, a petition setting forth that they desire to adopt measures to reclaim the same, the description of the lands they propose to reclaim, by township, range, section and subdivision of section; the quantity sold and the quantity remaining unsold, the number of acres in the whole district and the number of acres in each tract sold, with the name (if known) of the owner thereof."

It will be observed that the petition is required to set forth "the quantity sold and the quantity remaining unsold, the number of acres in the whole district and the number of acres in each tract sold, with the name (if known) of the owner thereof." The petition in this case is wholly silent as to "the quantity sold and the quantity remaining unsold" within the proposed district. There is, it is true, annexed to the petition a schedule which is referred to as containing a description of the land sought to be reclaimed, "the several tracts of land in said district, the number of acres in each tract, and the names of the owners thereof so far as known." In the schedule the several tracts are described by township, range, section and subdivisions of sections, as required by the statute, and opposite to a large number of the tracts are set down the names of the owners severally, but opposite to many other tracts is the word "unknown," to indicate that the owner is unknown.

It is claimed by the respondents that, inasmuch as the schedule contains a complete list of all the lands within the district, and sets forth the name of the owner of each tract, except where the names are unknown, that this is equivalent to an

averment that all the lands had been sold, and that it was therefore unnecessary to aver the fact directly in the body of the petition. But it appears from the schedule that the names of many of the owners were unknown; and to construe this as equivalent to an averment that these lands with unknown owners had been sold by the state would be to substitute a very remote presumption where the statute requires a direct allegation. The records of the state land office furnish the data for ascertaining with accuracy what lands have been sold and what remain unsold within any particular district, and in seeking to establish a new district this requirement of the statute ought to be so complied with as not to need the aid of presumption to supply deficiencies in the averments of the petition.

Nor does the schedule state the number of acres in each tract, as required by the statute. On the contrary, opposite some of the full sections is only the word "whole" to indicate the quantity, without stating it in acres. Whilst, ordinarily, a section contains six hundred and forty acres, it is well known that owing to the inaccuracy of instruments and other causes many full sections in the government surveys contain considerably more or less than that quantity. It also appears from the schedule that a large proportion of the land in the proposed district is owned by the "Sacramento Valley Reclamation Company," but there is no averment in the petition that this company is a corporation, or if a corporation, that it is capable in law of acquiring and holding so large a body of real estate.

For these reasons the petition does not comply with the requirements of the statute, and its deficiencies cannot be helped out by averment and proof in this action. Whether or not the board acquired jurisdiction of the proceeding must be determined on the face of its own record, which cannot be enlarged or aided by proof aliunde. The foundation of their jurisdiction in this class of cases is a sufficient petition, the requisites of which are prescribed by the statute, with none of which either the board of supervisors or this court have the power to dispense.

We are, therefore, of opinion that the board exceeded its jurisdiction in entertaining the petition.

This disposes of the present action, and it is therefore unnecessary to decide the other points discussed by counsel; but it may be proper to add that, on looking into the record, we entertain a grave doubt whether, under the existing statutes, lands held under Mexican grants can be included in swamp land reclamation districts, and particularly if the land so sought to be included be not itself swamp land. But we are not to be understood as expressing a decided opinion on this point.

Let an order be entered vacating and annulling the proceedings of the board of supervisors of Yolo county establishing "Reclamation District No. 108."

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## M. P. SWEET, Respondent, v. HUGH McGLYNN, Appellant.

No. 3702; April 28, 1873.

**Default Judgment—When Should be Set Aside.**—Where a defendant has failed to answer through an excusable misunderstanding between his attorney and himself, rather than through either intention or indifference, and he really thought he had a good defense and intended to have it made, a default judgment against him should be set aside.

W. H. Allen for respondent; Sharp & Lloyd for appellant.

By the COURT.—This is a motion to set aside a judgment, and to be allowed to answer, under the sixty-eighth section of the Practice Act.

The complaint was filed in one of the district courts in the city of San Francisco on the tenth day of October, 1872, and on the same day summons and attachment were taken out and duly served on the defendant in that city. On the twenty-fourth day of October judgment was entered against the defendant by default, and on the first day of November he obtained an order that the plaintiff show cause why the judgment should not be set aside. The motion was heard upon affidavits filed by both parties, and denied.

It appears from the affidavits that, immediately after the summons and attachment were served, the defendant went to an attorney and told him his property had been attached and he wanted to get it released; that he did not owe the plaintiff anything and wanted the attorney to attend to the case for him; that they then went together to the sheriff's office and procured the property to be released from the attachment; that nothing was said about the summons, and the defendant, being an illiterate man, little acquainted with legal proceedings, thought nothing about it, but supposed his lawyer would go and attend to that case; that the attorney supposed that the summons had not been served, and that when it should be he would be notified of that fact; that the defendant intended to defend the action and was advised that he had a good defense; that neither the defendant nor his attorney knew of the default being taken until November 1st, when an execution was issued and levied.

There is some little conflict in the affidavits, but, on the whole, we think it sufficiently appears that the defendant did not intend to let judgment go against him by default, but that he thought he had a good defense, and intended and expected to have it made.

We are of the opinion that the showing was sufficient to authorize the court to set aside the judgment, and that it ought to have done so, the defendant paying all the costs of the case up to that time.

Order reversed and cause remanded.

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## CITY OF STOCKTON, Appellant, v. C. M. CREANOR, Respondent.

No. 3750; April 30, 1873.

**Street Improvements—Authority of Committee of Council.**—The charter of Stockton, by authorizing the common council of the city to cause streets to be graded and to let contracts in that connection, conferred no such authority upon a committee of that body.

**Street Improvements—Committee Exceeding Authority—Curative Act.**—Such an irregularity as the assuming by a committee of

the common council of Stockton of the functions of the whole body under the charter, in causing streets to be graded and letting contracts for the grading, is not cured by the act of 1870 reincorporating the city.

APPEAL from Fifth Judicial District, San Joaquin County.

Byers & Elliott for appellant; D. S. Terry for respondent.

See City of Stockton v. Creanor, 45 Cal. 247.

By the COURT.—The bid sent in by Myers was a bid for the entire work, and not for separate blocks, as required by the ordinance. No express contract was entered into between the city and Myers, but the street committee accepted his bid for the grading of the street along eight out of the nine blocks mentioned in the ordinance. The city charter authorizes the common council to cause the streets to be graded, and for that purpose to let contracts, etc., but this authority is not conferred upon a committee of the common council by the charter nor by ordinance, even if it be conceded that such authority may be delegated by the common council. The provision of the charter that the common council may reject all bids prohibits by implication the exercise by a committee of the power to accept a bid and award a contract. We are of the opinion that the bid must be accepted and the contract awarded by the common council.

These irregularities in respect to the bid and the award of the contract are not cured by the provisions of section 55 of the act of 1870, to reincorporate the city of Stockton (Stats. 1869–70, p. 608), for the decision of the board of equalization is final and conclusive only in respect to "all errors and irregularities which said board could have remedied and avoided" on an appeal to the board as in that section provided. The board could not then correct either of those irregularities. Nor are those irregularities corrected by the provisions of section 40 of that act, respecting the delinquent list; for that section provides that such list shall be evidence of the matters therein recited; but as it is not declared to be conclusive evidence of those matters, it does not preclude the lot owner from showing and relying upon a substantial error in the prior proceedings.

Judgment affirmed.

HENRY DALTON, Appellant, v. BOARD OF WATER COMMISSIONERS, SAN JOSE TOWNSHIP, Respondent.

No. 3787; May 6, 1873.

**Waters—Arbitration—Jurisdiction of Court.**—Under a law whereby, in case of a disagreement between persons as to the compensation to be given one for the conduct of water over his land to the land of the other, the question is to be submitted to arbitrators, who are to file their report thereupon in the county court for its action, the court has no jurisdiction in a case where no such disagreement is shown.

APPEAL from Los Angeles County.

A. Brunson and Kewen & Howard for appellant; V. E. Howard & Sons for respondent.

See Dalton v. Board of Water Commrs., 49 Cal. 222.

By the COURT.—It is provided by section 15 of the act to regulate watercourses (Stats. 1860, p. 335) that the person or persons who shall conduct water across the lands of other persons shall pay them "such compensation as may be agreed upon by the parties owning the land; and in case the parties cannot agree," then arbitrators are to be appointed, and their report is to be filed in the county court for its action, etc. It nowhere appears in this case that the parties could not agree as to the compensation mentioned in that section. The county court had no authority to proceed in the matter, except upon the failure of the parties so to agree. That fact is a jurisdictional fact: Gilmer v. Lime Point, 19 Cal. 47; Contra Costa R. R. v. Moss, 23 Cal. 329. The other points need not be noticed, except to say that parties cannot acquire rights under that statute except by a strict compliance with its provisions.

Order reversed.

JOSEPH L. MOODY, Appellant, v. S. E. PALMER, Administrator, et al., Respondents.

No. 2715; May 16, 1873.

**Highway—Abandonment—Reversion of Fee.**—When land conveyed is bounded by a highway, the conveyance carries the fee to the center of the road, so that when the right of way or easement ceases, the soil becomes the absolute property of the grantee or his assigns.

**Limitation of Action—Constitutionality of Statute.**—The act of March 5, 1864, sometimes called "The Hawes Limitation Act," is not repugnant to the constitution of the state.

APPEAL from Fourth Judicial District, San Francisco County.

Williams & Thornton for appellant; Whiting, Naphtaly & Newman for respondents.

See Moody v. Palmer, 50 Cal. 31.

BELCHER, J.—The action is ejectment to recover the possession of a parcel of land in the western addition to the city of San Francisco. Both parties claim title in fee. The material facts developed at the trial are as follows: In 1852 Dyer and Gladding, who were partners in business, purchased the possessory claim to an uninclosed tract of about eighty acres of land and took the deed in the name of Dyer alone. There was at the time a small inclosure upon the tract for a chicken-yard. They entered into the actual possession of the part inclosed and continued to hold it until some time in 1853, when they made fences which, with fences already constructed by others, inclosed the whole tract. Shortly after making the inclosure they laid out the ground in blocks, lots, streets and alleys, and procured a map or plat to be made showing it as thus laid out. One of these streets they named Park avenue. They also, from time to time, sold and conveyed to various persons parcels of the tract, bounding them upon the streets so laid out. In July, 1854, Dyer made conveyances to Simmons and Folsom and to Bassett, commencing in one deed "at the northwesterly corner of Pine street and Park avenue,"

and in the other at the "northeast corner of Pine street and Park avenue," and then in each running round to Park avenue, and "thence at right angles along the Park one hundred and twenty feet to the place of beginning."

The unsold portions of the tract they used for various purposes until October, 1855, when they dissolved their partnership and divided their property. To make the division Dyer conveyed his interest in a portion of the tract to Gladding, but Gladding made no deed to Dyer, it being supposed by them that the legal title was then in Dyer. Shortly after the division Dyer went away from the land and never afterward lived upon or had actual possession of any portion of it. In 1858 the whole tract was laid out by commissioners appointed by the city into blocks and streets, and some of the streets, including Park avenue, theretofore laid out by Dyer and Gladding, were abandoned and ceased to be used as such. The land in controversy in this action is that which lay in Park avenue, adjacent to the land conveyed by Dyer to Simmons and Folsom and to Bassett in July, 1854, and also a strip seventeen and a half feet wide at the north end thereof. The defendants have the title of Gladding to all of the demanded premises and that of Dyer to all except the narrow strip spoken of, provided the descriptions in his deeds of the adjoining land are to be regarded as extending to the center line of Park avenue. They have also been in the actual possession of the premises since some time prior to 1861. The plaintiff claims title under a conveyance made by Dyer in 1868.

The court, at the request of the defendants, instructed the jury to the effect that when land is conveyed and bounded by a highway, street or avenue, the conveyance carries with it the fee to the center of the road, street or avenue, as part and parcel of the grant, and that when the right of way or easement ceases, the lands included within the street or avenue belong to the adjoining owner as part of his grant; that if the jury should find that Dyer or Gladding, or both, conveyed any of the lands upon and bounded by Park avenue, the fee to such lands extended to the middle of such street or avenue, and passed to the adjoining grantee and owner, and that when the avenue ceased to be used as such, the adjoining grantee and owner held such street or avenue as his own, free and clear of such way or easement.

And the court refused the request of the plaintiff to instruct the jury that if the legal title of the property in controversy vested in Dyer at any time subsequent to the 8th of October, 1855, then Dyer's title passed to and vested in the plaintiff by virtue of Dyer's deed to him, and he was not barred by any statute of limitations, inasmuch as the act of the legislature, approved March 5, 1864, entitled "An act to limit the time for the commencement of civil actions in certain cases," is unconstitutional and void.

The defendants had judgment and the plaintiff appealed.

The giving of the instruction asked by the defendant and the refusal to give that asked by the plaintiff constitute the only errors assigned in the case.

1. There can be no doubt that when Dyer conveyed to Simmons and Folsom and to Bassett in 1854, he conveyed all his interest to the center line of Park avenue. It is well settled that when land is described in a deed as bounded by, upon, or along a public highway, street, or stream not navigable, it will be regarded as extending to the center of such highway, street or stream, unless it clearly appears that the parties intended to make a side line instead of the center line the boundary. This rule has been adopted out of considerations of policy, and it will always be applied if it can be done without manifest violence to the words used in the conveyance. The road is a monument, and in legal contemplation the thread of the road is the monument or abuttal: Newhall v. Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; 2 Smith's Leading Cases, 232.

There is nothing in Dyer's deeds showing any intention to make the side lines of the avenue the boundaries. The fact that corners of Pine street and Park avenue are made initial points has no such tendency.

It follows that when Park avenue was abandoned and ceased to be used as a street, the title to so much of it as lay adjacent to the land theretofore conveyed by Dyer was not in him, but in his grantees, or in them in common with Gladding. It also follows that, as to this land, no title vested in Dyer under the provisions of the Van Ness ordinance, and that his deed to the plaintiff was inoperative to convey any right therein.

2. The plaintiff insists that the act of March 5, 1864, sometimes called the "Hawes Limitation Act," is repugnant to

that provision of the constitution which provides, "that all laws of a general nature shall have a uniform operation"; and to that which declares that men have certain inalienable rights, among which are those of "acquiring, possessing and protecting property"; and to that which declares that no person shall be deprived of his property "without due process of law"; and also to that which declares that "no bill of attainder, ex post facto law, or impairing the obligation of contracts shall ever be passed."

The first section of the act reads as follows: "In any action which shall be commenced more than one year after this act takes effect for the recovery of real property situated in the city and county of San Francisco, or for the recovery of the possession thereof, or in which the title to such real property shall be tried or affected, none of the provisions of the act entitled an act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city, passed March eleventh, eighteen hundred and fifty-eight, and none of the provisions of either of the orders or ordinances therein recited or referred to, shall be deemed, construed, or have effect to give, confirm, or otherwise aid the right or title set up or claimed by any party, unless such party, his ancestor, predecessor, or grantor, shall have had actual possession of the land in dispute within five years next before the commencement of such action, the time already elapsed when this act takes effect to be included in the computation."

This act was under consideration in the case of Brooks v. Hyde, 37 Cal. 366, and was held not to be unconstitutional. The only point made was, that it was repugnant to that provision of the constitution which provides "that all laws of a general nature shall have a uniform operation," but it was considered by the court not to be repugnant to that or any other provision of the constitution. It may be admitted that the constitutionality of the act was not necessarily involved in that case, inasmuch as the judgment was reversed upon other grounds; still we are of the opinion that upon the point discussed the reasoning is convincing and the conclusion arrived at correct.

In considering the other grounds of alleged unconstitutionality we must first ascertain what was the scope and purpose of the act, and in doing this it may be well to bear in mind the three points which, Blackstone says, should be considered in the construction of all remedial statutes—the old law, the mischief, and the remedy. It is a part of the familiar history of the city of San Francisco that after the passage of the Van Ness ordinance many questions arose as to who were the beneficiaries of the ordinance in particular instances, and that out of these questions arose uncertainty of titles, vexatious and expensive litigation, and sometimes personal conflicts. It was claimed by many parties who had not the actual possession which the ordinance made necessary to the transfer of title that their possession had been interrupted by intruders or trespassers, and that they could and would recover it back by legal process. But all the titles being derived through the grant to the pueblo to which the city was successor, there was no statute of limitations applicable to them, and no fixed time in which actions must be commenced. In this condition of things the act in question was passed by the legislature, providing, as we construe it, that if at the time of the passage of the act one were out of the actual possession of land which he claimed and had been out for four years or more, and another were then in the possession, he should bring his action to recover possession within one year thereafter; or if he were out of the actual possession, but had been out for less than four years, then he should bring his action to recover the possession within five years from the time he went out of the actual possession; and this under the penalty of not being permitted to avail himself of the ordinance for the purpose of establishing his title. The act applied only to such causes of action as were existing at the time of its passage, and gave no one less than a year in which to assert his rights. It was a statute of repose, and was intended to meet a then present public want, by requiring all adverse claims to be early put in suit and adjudicated.

In this view of the act we are unable to see how it in any way interfered with the "acquiring, possessing and protecting

property," or deprived anyone of his property "without due process of laws," or impaired "the obligation of contracts."

It results that there was no error committed by the court, and that the judgment must be affirmed.

So ordered.

We concur: Wallace, C. J.; Crockett, J.; Niles, J.

RHODES, J.—I am unable to concur in the conclusion announced in the opinion, in respect to the validity of the "Hawes Limitation Act"; but in my judgment that act is unconstitutional and void.

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GEORGE TUSCH, Respondent, v. JAMES H. CUMMINGS, Appellant.

No. 3562; July 15, 1873.

**Evidence.—A Matter Alleged in the Complaint and not Denied** in the answer is not subject to disproof by evidence at the trial.

**Partnership.—A Promissory Note Made to Two Persons, Copartners,** for a partnership demand, and assigned by one of them in the name of both, may be recovered upon at suit of the assignee or of his assignee.

APPEAL from Sixth Judicial District, Sacramento County.

R. C. Clark for respondent; Hall & Avery for appellant.

CROCKETT, J.—The grounds principally relied upon for a reversal of the judgment are, that the court erred, first, in excluding the testimony of Wade, offered to show that the partnership between White and Wade had been dissolved before the assignment of the note to G. W. White; second, in finding that the plaintiff had acquired the interest of Wade in the note, and rendering a judgment for the plaintiff therefor.

On the first point it is sufficient to say that the complaint was verified, and not only alleged the partnership, but that

it was an existing partnership at the commencement of the action. This allegation was not denied in the answer, and is therefore to be deemed admitted. The defendant has no right to controvert a fact admitted by the pleadings.

The partnership being admitted, and there having been sufficient proof that the note was executed to the two copartners for a partnership demand, and was assigned by one of them, in the name of both, to G. W. White, by whom it was assigned to the plaintiff, the court properly held that the plaintiff had acquired the title, and was entitled to judgment for the whole amount due on the note.

We deem it unnecessary to notice the other points discussed by counsel.

Judgment affirmed and the remittitur to issue forthwith.

We concur: Belcher, J.; Niles, J.; Rhodes, J.

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## CITY AND COUNTY OF SAN FRANCISCO, Appellant, v. SPRING VALLEY WATER WORKS, Respondent.

No. 3699; July 16, 1873.

**Appeal.—On a Second Appeal of a Case a Party may not Avail Himself** of a ruling made at the first while denying the truth of matter on which that ruling was based.

**Evidence.—Matters Set Up in the Complaint and not Denied** in the answer are deemed admitted.

**Waterworks—Free Supply to City.—In an Act Granting a Franchise** to waterworks proprietors and fixing their relations with a city they propose to supply, a provision whereby, in case of fire, their pipes may be tapped by the fire department free of charge until the introduction of water into the city by some other person, after which they are to "furnish for fire and other municipal purposes their quota or proportion," etc., is to be construed as requiring these proprietors to furnish their quota or proportion free of charge for all municipal purposes.

**Waterworks—Interpretation of Franchise.—In an Act Granting a Franchise** to waterworks proprietors and fixing their relations with a city they propose to supply, the words "shall be introduced into," as employed in the phrase "until such time as water shall be intro-

duced into such city . . . . by some other person"—so employed to mark an event which shall work a change in one feature of these relations—are construed as meaning "shall be provided for."

**Waterworks—Time for Laying Pipe.**—If an Act Granting a Franchise to waterworks proprietors and fixing their relations with a city they propose to supply requires a certain amount of pipe to be laid in the city within a named time, and if subsequently the legislature enlarges this time by an amendment, in no manner changing the words of the act otherwise, the duties of the waterworks proprietors toward the city remain as before except that they have additional time for laying pipe.

APPEAL from Fifteenth Judicial District, San Francisco County.

W. C. Burnett for appellant; Charles N. Fox for respondent.

See San Francisco v. Spring Valley Water Works, 48 Cal. 493.

CROCKETT, J.—The defendant contends that all the questions arising on this appeal, except that of former recovery, are precisely the same which were adjudicated by this court, and are claimed to have been decided against the plaintiff on the former appeal: San Francisco v. Spring Valley Water Works, 39 Cal. 473. But we are of a different opinion. On the former appeal the only questions before us were: first, whether the court below properly refused to grant a temporary injunction; second, whether the court erred in sustaining the demurrer to the complaint. On the first point we affirmed the order denying the injunction, and decided that, inasmuch as the complaint contained no sufficient averment to the effect that water had been introduced into the city and county by any other person, it was not incumbent on Ensign and his associates, or their successors, until the happening of that event, to furnish water free of charge for general municipal purposes, exclusive of that required for the extinguishment of fires. We held that such a duty would in no event arise until the happening of that event, if it should occur, and that the complaint failed to aver that the event had transpired. On this ground we held that the injunction was properly refused, as the facts were then presented. This was

all that the exigency of the case required us to decide on that point; and in the view which we took of the complaint, it did not present the question whether it would be the duty of the defendant to furnish water free of charge for general municipal purposes after someone else had introduced water into the city and county. Whatever was said or intimated on that point in the opinion of the court was obiter dictum, provided the view taken of the complaint was the correct one. But it is now said that the court misconstrued the complaint, and that it did in fact contain the averment which was assumed to have been omitted. However this may be, the defendant is estopped from raising the point. The adjudication of the court as to the character of the complaint and its legal effect has become the law of the case, and it is too late now to inquire into its correctness. It may be remarked, however, that if the court fell into an error in the particular referred to, the counsel who now raises the point fell into the same error; for, on referring to his brief on the former appeal, we find the statement that "the complaint not only fails to show, but it positively negatives, the proposition that any other person or persons have introduced water into said city and county." The defendant has had the benefit of a favorable ruling by this court on the assumption that the above statement was true; and we are now asked to decide that the plaintiff shall be precluded from supplying the omitted averment, on the ground that it is not true that the omission existed. But the defendant will not be permitted to claim the benefit of our former ruling and at the same time to repudiate the existence of the assumed fact on which the ruling was based. We are, therefore, of opinion that we are not precluded on this appeal from considering the legal effect of the averment in the second amended complaint in respect to the introduction of water by the San Francisco City Water Works in September, 1858.

On the former appeal we had no occasion to decide, as we construed the complaint, whether it would be incumbent on the defendant to furnish water free of charge for general municipal purposes after water had been introduced by some other person or corporation. But on the return of the case to the court below the complaint was amended by inserting

an averment to the effect that the San Francisco City Water Works was authorized and required, by proper laws and ordinances, to introduce water into the city and county for fire, municipal, and other purposes, and that in pursuance of its authority it introduced the water on the 16th of September, 1858, and continued to supply it until the year 1865, when its works and franchise were conveyed to the defendant. The franchise to Ensign and his associates now held by the defendant was granted by the act of April 23, 1858, and was, therefore, prior by some months to the introduction of water by the other company. These facts are not denied by the answer, and are, therefore, to be deemed admitted.

The plaintiff contends that under the third section of the Ensign act it became the duty of the defendant to furnish water free of charge for general municipal purposes so soon as water should be introduced by some other person or corporation, and it claims that this event happened on the 16th of September, 1858, when water was introduced by the other company as above stated.

The third section of the act is in these words: "The chief engineer of the fire department, under the direction of the board of supervisors of said city and county of San Francisco, shall have the right to tap any pipes so laid down, and connect hydrants therewith, for the extinguishment of any fire or fires, during the pendency of the same, free of charge, to the full capacity of the said waterworks, up to and until such time as water shall be introduced into such city and county by some other person or persons; thereafter said Ensign and his associates or their assigns shall furnish for fire and other municipal uses their quota or proportion of whatever water may be produced by them, or may be introduced by any other person or persons."

The only doubt which can arise in construing this provision proceeds from the words "and other municipal uses" in the last clause. If these words had been omitted, it would have been perfectly obvious that it was the duty of Ensign, his associate and assigns, to furnish water free of charge for the extinguishment of fires, to the full capacity of their works, if necessary, up to the time when water should be introduced by some other person, and that thereafter they should be required to furnish only "their quota or propor-

tion," free of charge. But it would not, either before or after the introduction of water by another person, have been their duty to furnish water free of charge for other municipal uses. On the former appeal Mr. Justice Temple, in delivering the opinion of the court, said: "If we read the section omitting the words 'for fire and other municipal uses,' we find the section complete in itself, and free from all difficulty. The provision that thereafter they shall furnish their quota or proportion is a qualification to the requirement that theretofore they should furnish all to the extent of the capacity of their works. It was a division of a burden, which up to that time they were required to sustain alone, with any other party who might afterward introduce water into the city. And there can be no doubt that they will be required to furnish their proportion of water after the burden shall be thus divided upon the same terms that they are previously required to furnish all—that is, free of charge."

We fully acquiesce in this construction of the statute. But it is clear that after water shall have been introduced by some other person, it will be the duty of the defendant, as the successor of Ensign and his associates, not only to furnish free of charge its quota of water for the extinguishment of fires, but also to furnish its quota for other municipal uses; and whether this shall be for a compensation to be paid or "free of charge" is the point in issue here. That it shall furnish its quota for general municipal purposes can admit of no doubt, for the statute expressly requires it to do so whenever water shall be introduced by another person; and if that event has happened, it must furnish its quota either for a compensation or without it, according to the interpretation to be placed upon the statute. As I construe the statute, it contemplates that, on the happening of the specified contingency, the defendant shall furnish its quota of water for all municipal purposes, free of charge. We have already seen that its quota for the extinguishment of fires was clearly intended to be without charge, and if it had been the intention to discriminate between water furnished for that purpose and for other municipal uses, the presumption is strong that the statute would have so provided. So far from this, the statute, after requiring the defendant to furnish, free of charge, its quota of water for fires, immediately adds the words "and other

municipal uses," with nothing to indicate that water for these "uses" must be paid for, or was to stand upon a different footing from water furnished for fires. It is made the duty of the defendant to furnish the water, and the statute omits to impose upon the plaintiff any obligation to pay for it, from which no other reasonable inference can be drawn than that it was to stand on the same footing with water furnished for fires. Moreover, if it was intended that water for municipal uses, other than the extinguishment of fires, should be paid for, it was wholly superfluous to insert a provision requiring the defendant to furnish it, as the city and county, like any other consumer, would be entitled to the water on paying for it; and if it was to be paid for, it is yet more strange that the statute should excuse the defendant from furnishing it until after somebody else had introduced water into the city, when there would be much less need for it than before. On no reasonable construction can the statute be held to justify the interpretation placed upon it by the defendant.

But has the event happened on the occurrence of which the duty was to arise to furnish water for general municipal uses? The franchise to Ensign and his associates was granted by the act of April 23, 1858, and water was introduced into the city by the San Francisco City Water Works during the following month of September, and continued to be supplied by that company to the inhabitants until its franchise and works were conveyed to the defendant in 1865. On the happening of this event the defendant apparently became liable to furnish its quota of water for general municipal uses, free of charge, under the Ensign act. The argument for the defense on this branch of the case is, first, that the duty of the defendant in this respect was to commence only when water should be "introduced in said city and county by some other person or persons"; and it is said that water was not introduced into the city and county by the San Francisco City Water Works from without, but was furnished from a source within, the territorial limits of the city and county; second, that the Ensign act was amended or re-enacted by the act of April 11, 1859, and that the franchise took effect only from that date, which was subsequent to the introduction of water by the other company; and that by the very letter of the third section the duty did not arise until water should be thereafter

introduced by some other person, which, of course, could have no reference to water already introduced by the San Francisco City Water Works. But neither of these points is tenable. When the statute employs the phrase, "shall be introduced into said city and county by some other person or persons," it had no reference to the place from which the supply was to come, whether from within or without the territorial limits of the city and county, but only to the fact that a supply of water should be utilized and distributed for the use of the inhabitants. The term "introduced into," as here used, is an equivalent for the phrase "provided for." This is perfectly apparent, when reference is had to the purpose of this provision, which was to impose certain duties on Ensign, his associates and assigns, in respect to furnishing water for fires and other municipal uses, in the event that a supply of water should also be furnished for similar uses by some one else. It would have been absurd to make these duties depend upon the fact whether the other supply came from within or without certain territorial limits, and it is evident the legislature had no such purpose.

On the second point, it is to be observed that by the first section of the act of April 23, 1858, Ensign and his associates were required to lay down a certain amount of pipe within one year after the passage of the act. This section was reenacted by the act of April 11, 1859, in totidem verbis, with the exception that the time limited for laying down the pipe was to be two years from the passage of that act, instead of one year from the passage of the former act. Its effect was merely to extend the time, and there was no attempt to repeal or modify the other sections of the first act, and they, therefore, remained in force from April 23, 1858, with like effect as though the first section had not been amended. They took effect and were operative from that date, and their operation was in no wise suspended or modified by the amendment of the first section. The proposition decided in Billings v. Harvey, 6 Cal. 383, and subsequent cases, therefore, has no application to the question. The duties imposed on Ensign and his associates by the third section remained wholly unaffected by the fact that in 1859 the legislature extended the time within which they were to lay down certain pipes; and though it may be true, as claimed by counsel, that the first section

of the original act did not remain in force after the passage of the amendatory act, it by no means results that, when the third section speaks of water to be introduced by some other person, it should be held to refer only to water to be introduced after the passage of the amendatory act. On the contrary, by every just rule of interpretation it must be deemed to refer to the introduction of water at any time after that section took effect.

It appears from the original act that two other companies had already been organized for the purpose of supplying the city with water, and their rights are expressly reserved as against Ensign and his associates. One of these companies introduced water into the city a few months after the passage of the Ensign act, and when the third section refers to the introduction of water by others, it doubtless had special reference to one or both of these companies. I am, therefore, of opinion that when one of them introduced water into the city, the contingency had happened on which it became the duty of Ensign, his associates and assigns, to furnish their quota of water, free of charge, not only for the extinguishment of fires, but also for other municipal uses.

This view of the case renders it unnecessary to consider the question of former recovery.

Judgment and order reversed and cause remanded for further proceedings in accordance with this opinion.

We concur: Niles, J.; Belcher, J.; Rhodes, J.

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## CENTRAL PACIFIC RAILROAD COMPANY, Appellant, v. JAMES PEARSON, Respondent.

No. 2654; July 18, 1873.

**Eminent Domain —Time of Which Value of Land Ascertained.—** A person whose land is appropriated to a public use by the exercise of the right of eminent domain is entitled to be paid the value of the land as at the time when so taken, and not the value as at the time it was applied for.

**Eminent Domain—Compliance With Statute.**—When a railroad company invokes the exercise of the right of eminent domain for the purpose of devesting titles, it must pursue the statute substantially, not in some only, but in all, its provisions.

APPEAL from Sixth Judicial District, Sacramento County.

Robert Robinson for appellant; A. P. Catlin and J. H. McKune for respondent.

See Central Pac. R. R. Co. v. Pearson, 35 Cal. 247.

CROCKETT, J.—This is a proceeding to condemn lands for railroad purposes, and on the filing of the petition the court entered an order authorizing the petitioner to take possession of and use the land pending the proceedings on filing a bond with sureties as required by the statute. The bond was filed and the petitioner took possession of all the land, except three lots belonging to Pearson. Answers were filed by the land owners contesting the right to condemn the lands and denying the necessity of condemning them for railroad purposes. On hearing the petition the court entered an order adjudging that the lands were necessary and proper for the use of the petitioner and appointed commissioners to appraise their value. In December, 1866, the commissioners filed their report and assessment of damages, which were confirmed by the court, but on appeal to the supreme court the order confirming the report was reversed. Subsequently, in December, 1869, on notice and motion, the order previously made authorizing the petitioner to take possession of the land was vacated and set aside, so far as the same related to the three lots of Pearson before mentioned. The court then ordered the commissioners to proceed and ascertain the proper compensation and damages to be paid for the lands. In June, 1870, the commissioners filed their report, from which it appears that during the proceedings before them a contest arose between the petitioner on the one side and the land owners on the other as to the date to which the valuation should relate—the petitioner claiming that the property should be valued as of the 11th of October, 1866, when the proceedings were commenced, and the respondents that they were entitled to the present value. It was thereupon agreed that the commissioners should ascertain and report the value at each of

these periods, which was accordingly done. They reported that on the 11th of October, 1866, when the petition was filed, the aggregate value of the land sought to be condemned was fifteen thousand two hundred and twenty dollars, and in June, 1870 (the date of the report), it was twenty-three thousand three hundred and two dollars. The commissioners adopted the latter as the proper sum to be awarded as the value of the land, and the district court having concurred in this view of the law, the petitioner has appealed from the judgment and order confirming the report. The only question for our decision, therefore, is whether the court below erred in adopting the date of the report as the period to which the valuation should relate.

The solution of the question must depend upon what shall be determined to have been the time at which the land shall be deemed to have been taken for public use, for there can be no doubt whatever that a person whose property is appropriated to a public use by an exercise of the right of eminent domain is entitled to be paid the value of it at the time when it was so taken. This is too plain to need either argument or illustration. The only difficulty lies in determining at what time the property shall be deemed to have been "taken," in the sense of the constitution. On the one side it is contended that the land was "taken," in a legal and constitutional sense, when the petition was filed seeking to condemn it, and the court authorized the petitioner to take possession of and use it on giving a proper bond; or, if not then, certainly when the court heard the petition, decided the issues raised by the pleadings, and adjudged that the lands were necessary and proper for the use of the petitioner. It is argued that the right to use and appropriate the land then became complete in the petitioner, and nothing thereafter remained to be done except to ascertain its value at that time; the bond which had been given standing in the meantime as a substitute and security for the payment of the value when ascertained. On the other side, it is contended that under the constitution no one can be deprived of his title and the right to use and enjoy his property until its value has been ascertained and paid, and consequently, that the time to which the valuation relates must approximate as nearly to the payment as is consistent with the unavoidable delay which inter-

venes between the judgment and execution. We think it is clear that the time of filing the petition is not the time to which the valuation should relate. The land is not "taken" in any sense by the mere filing of a petition for condemnation which may be voluntarily dismissed by the petitioner on the next day. The filing of the petition creates no title in the petitioner, and, of itself, does not give a right of entry for the purposes of construction. Nor does the order of the court permitting an entry for the purposes of location and construction constitute a "taking" in a legal sense. It was so decided in Fox v. Western Pacific R. R. Co., 31 Cal. 555, in which Mr. Justice Sanderson, in delivering the opinion of the court, said: "Under no circumstances, then, can the entry be regarded as the taking, nor, indeed, can it be said in any legal sense that the land has been taken until the act has transpired which devests the title or subjects the land to the servitude. So long as the title remains in the individual, or the land remains uncharged by the servitude, there can have been no taking under conditions which, as already stated, preclude the commission of a trespass. The government and the individual really stand in the attitude of contracting parties, with this difference only, that the former has the power to compel the contract, if willing to pay what may be ascertained to be a fair price. Until the price has been ascertained the government is not in a position to close the bargain, and when it is ascertained, if the sum is not satisfactory, the government may withdraw. The government is under no obligation to take the land if the terms, when ascertained, are not satisfactory." If this be accepted as a correct exposition of the relations of the parties toward each other, it is evident that the mere entry under an order of the court, before the price is ascertained, can have wrought no change in the title and does not constitute a taking in a legal sense. And it is equally clear, we think, that the order adjudging that the lands were necessary and proper for the use of the petitioner did not have the effect to change the title or subject the land to the servitude. At that point of time the price had not been ascertained, and the government was "not in a position to close the bargain," and when ascertained, "if the sum is not satisfactory, the government may withdraw." It cannot be said with any propriety that the land had been "taken," so long

as the price had not been ascertained, and when the government would be under no obligation to take it even after the price was ascertained. The result at which Mr. Justice Sanderson arrived was, that "in the sense of the statute, the taking consists of a series of acts commencing with the entry for the purpose of location and terminating in the act of payment." Accepting this as the correct theory, it is clear that the taking would not be complete until payment was made.

Nor can the execution of the bond, as provided in section 34 of the statute, be deemed a payment in the sense in which that term is here used, if the government or its agent, the petitioner, would be at liberty to decline to take the land when the price is ascertained. Under no circumstances could the land be deemed to be taken so long as the government was at liberty to decline to take it. But the statute provides that on obtaining the order authorizing it to take possession of the land, "the company shall pay a sufficient sum into court, or give security, to be approved by such court or judge, to pay the compensation in that behalf when ascertained."

If it be assumed that, on giving the bond, the company thereby undertook absolutely to pay the damages when assessed, and were not thereafter at liberty to retract if they should be dissatisfied with the amount, and if the bond should be deemed to be sufficient substitute for a payment in cash, nevertheless I think the valuation should relate to the time when it is made, and not to the date of the order adjudging that the land was necessary to the company for railroad purposes. This order was but one of a series of acts, all of which were essential to change the title and subject the land to the servitude. If no further steps had been taken after the order was obtained, and the proceeding had been dismissed for want of prosecution before the value of the land had been ascertained, it could not be pretended with any show of reason that the title had vested in the company, and that the respondents must lose their land without compensation. They were not actors in the proceeding, and no judgment by default could have been rendered against them if they had failed to appear. It was not incumbent on them to see that the proceedings were prosecuted with diligence, or at all; and yet, if the order adjudging that the land was necessary for

railroad purposes had the effect, proprio vigore, to devest the title and subject the land to the servitude, the petitioner certainly had no motive to take another step in the proceeding. On the contrary, its interest in that event would prompt it to inaction and to permit the proceeding to terminate by a failure to prosecute it. It would thereby have acquired the title to the land without paying for it, and the former owners would have lost it without being in any default. Such a result would be repugnant to every principle of justice. But it is well settled that proceedings by which a citizen is to be deprived of his property without his consent are strictissimi juris, and in cases of doubt all intendments are in favor of the private right. When a railroad corporation invokes the exercise of the right of eminent domain for the purpose of devesting titles, it must pursue the statute substantially, not in some only, but in all, its provisions. One of these provisions is that the value of the property shall be ascertained by commissioners to be appointed by the court, and that on confirming the report, the court or judge shall "certify the same thereon." Section 33 provides that the report and certificate, "upon the compensation named therein being paid," shall be recorded by the railroad company in the recorder's office of the county; and section 35 provides that upon the filing of the report for record, "and upon the payment or tender of the compensation and costs, as prescribed in this act, the real estate, or the right, title, or interest therein described in such report, shall be and become the property of said company for the purposes of its incorporation, and shall be deemed to be acquired for, and appropriated to, public use." This is an explicit declaration of the time at which, and the conditions on which, the title shall vest and the property shall be deemed to have been "taken" for public use, and it evidently was not intended that the order of the court, adjudging that the land was necessary for railroad purposes, should operate to devest the title. By the very letter of the statute the land was not taken for public use until its value had been ascertained by commissioners whose report had been confirmed, certified and recorded, and until payment had been made or tendered. These views are in accordance with those announced in Bensley v. Mountain Lake Water Co., 13 Cal. 316, 73 Am.

Dec. 575, and San Francisco & San Jose R. R. Co. v. Mahoney, 29 Cal. 116.

I am therefore of opinion that the court below properly decided that the valuation should relate to the time when the assessment of damages was made.

Judgment affirmed.

We concur: Rhodes, J.; Niles, J.; Belcher, J.

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## ISAAC COULDTHIRST, Respondent, v. GEORGE F. KELLEY, Appellant.

No. 3613; October 16, 1873.

**Nuisance—Suit to Abate—Costs.**—In a Suit in Equity for the abatement of a nuisance, the allowance of costs is within the discretion of the court.

**Appeal—Exception for First Time on Appeal.**—When it does not appear from the statement on motion for a new trial that the instruction complained of, as a ground for the motion, was excepted to at the trial, the exception cannot be taken for the first time on appeal from the order denying the motion.

**Appeal.—Where There was a Substantial Conflict of Evidence** at the trial, the verdict thereupon is not to be disturbed on appeal as not being justified by the evidence.

E. V. Spencer for respondent; A. W. Blair and I. S. Chapman for appellant.

CROCKETT, J.—The plaintiff is the owner and in the use and occupation of a tract of land through which Susan river flows, and the defendant is the owner in possession of another tract higher up on the same stream.

The object of the action is to abate as nuisances certain dams and ditches constructed by the defendant, which, it is alleged, had the effect to divert the water from the plaintiff's premises, and also to recover damages occasioned by the diversion. The issues made by the pleadings were submitted to a jury, which returned a verdict in favor of the plaintiff for the sum of two hundred and twenty-five dollars, for which

amount and for costs judgment was entered for the plaintiff; but the judgment is silent in respect to abating the alleged nuisance. The defendant appeals from the judgment and from the order denying his motion for a new trial. The grounds of error relied upon are, that the court erred, first, in awarding costs to the plaintiff; second, in misdirecting the jury; third, in denying the motion for a new trial. The first point is not tenable. The action is in equity to abate a nuisance, and in such cases the allowance of costs is in the discretion of the court, and we think there was no abuse of discretion in this case: Harvey v. Chilton, 11 Cal. 114; Esmond v. Chew, 17 Cal. 336; Gray v. Dougherty, 25 Cal. 266.

The second point is also untenable. It does not appear from the statement on motion for a new trial that the instruction complained of was excepted to by the defendant, and the exception cannot be made for the first time in this court. Whether the instruction was correct or otherwise is a question not open to review on this appeal upon the record before us.

Nor can we disturb the order denying a new trial on either of the grounds alleged.

The affidavit of the defendant's attorney fails to show that the verdict was a chance verdict, within the meaning of section 193 of the Practice Act, as heretofore expounded by this court: Turner v. Tuolumne Water Co., 25 Cal. 397; Boyce v. Cal. Stage Co., 25 Cal. 474.

Viewed in the light most favorable to the defendant, there was at least a substantial conflict in the evidence pertinent to all the issues raised by the pleadings, and we cannot, therefore, disturb the verdict on the ground that it was not justified by the evidence.

Judgment and order affirmed.

We concur: Rhodes, J.; Wallace, C. J.; Belcher, J.; Niles, J.

E. D. WHEELER, Respondent, v. LEOLA K. TURNER, Appellant.

No. 3470; October 16, 1873.

**Appeal—Conflicting Evidence.**—An Order for Judgment, made without findings, where there had been a manifest conflict of evidence at the trial, is not to be disturbed.

**Attorneys.**—In an Action by an Attorney for Compensation for services rendered in conducting a case, before the end of the trial of which his client had discharged him, an order for judgment for less than the fee as agreed upon in advance of such trial would not indicate, in the absence of written findings, that the court had found a failure on the plaintiff's part to perform the agreement.

**Appeal—Damages in Absence of Merit.**—While affirming a judgment, where satisfied that the appeal is destitute of merit, the court exacts damages of the appellant.

APPEAL from Twelfth Judicial District, San Francisco County.

C. T. Botts for respondent; J. M. Seawell for appellant.

RHODES, J.—The contract alleged in the complaint is admitted by the answer. It is also conceded that the plaintiffs conducted the proceedings on behalf of the plaintiff in the action of Turner v. Ortiz up to a certain time, when their connection with the action ceased, and evidence was introduced to prove the value of the plaintiff's services in that action. The court ordered judgment for the plaintiffs for fifteen hundred dollars, but did not file any findings.

The defendant contends that the decision cannot be sustained, because the plaintiffs broke the contract by abandoning the prosecution of that suit, while the plaintiffs contend that they were discharged by the defendant as her attorneys. Upon this issue there is a manifest conflict in the evidence, and the decision will not be disturbed on the ground that the evidence was insufficient to sustain the implied finding that the plaintiffs were discharged as her attorneys in that action.

It is claimed by the defendant that the fact that the court ordered judgment only for fifteen hundred dollars (which

was less than their fees would amount to under the contract) proves that the court found that the plaintiffs did not perform the contract on their part. But that is not the necessary inference from that fact. A judgment in any sum for their services as the defendant's attorney would raise the presumption that the court found that they had not committed a breach of their contract.

Upon a careful examination of the voluminous record in this case we are satisfied that the appeal is destitute of merit.

Judgment and order affirmed, with ten per cent damages. Remittitur forthwith.

We concur: Crockett, J.; Belcher, J.; Wallace, C. J.; Niles, J.

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## E. R. LOWE, Respondent, v. GEORGE W. WOODARD, Appellant.

No. 3760; October 17, 1873.

**Association Formed to Defend Lawsuit—Assessments.**—Under a contract by which an association is formed to defend a suit for land, held in separate parcels by the associates, and directors are chosen to employ counsel, procure proofs, etc., with power in these directors to levy assessments on the associates according to their holdings, the assessments to be a lien on the land, which contract by its terms is to terminate when the suit does, no assessment can be made if after conclusion of the suit and payment of the costs the directors still have money of the associates in their hands.

APPEAL from Sixth Judicial District, Yolo County.

C. P. Sprague and E. R. Bush for respondent; J. Lambert for appellant.

CROCKETT, J.—The defendant, with other settlers on the Hardy grant, formed an association for the defense of an action brought against them by persons claiming under the grant. It was agreed that the business of the association should be conducted by a board of directors, who were authorized to employ counsel to defend the action and to procure the necessary proofs. In order to raise the necessary funds

to meet the disbursements, it was agreed that the directors might levy assessments on each of the associates in proportion to the assessed value of the land claimed by each severally, and that the assessments should become liens on the land. The action is brought to recover assessments alleged to have been levied on the defendant and to enforce the lien on his land. One of the provisions of the contract was that it should terminate upon the conclusion of the present suit in the circuit court, and that any costs, expenses or contracts made thereafter shall be by a new contract and agreement between said parties. The complaint avers that the suit was pending "continuously from the year 1863 until the year 1870 inclusive"; and the two assessments sued for were levied respectively in August, 1867, and October, 1870.

Amongst other defenses the answer avers that the directors have voted themselves large sums of money for services alleged to have been performed by them in excess of the compensation allowed by the contract; that long prior to the commencement of the action the association had ceased to exist, the objects and purposes of its formation having been accomplished, and the suit being fully ended and determined; that all the debts and liabilities of the association were paid and satisfied, and that there remains in the hands of the directors a balance of the funds of the association exceeding in amount five thousand dollars, "subject to the order and control of said directors"; and that no account of the appropriation of said sum has been rendered.

The court rendered a personal judgment against the defendant on the pleadings, and the appeal is from the judgment.

We do not see how the judgment can be sustained in the face of these averments in the answer. If the objects of the association have been fully accomplished and all its debts and liabilities paid, and if there remains in the hands of the directors a surplus of more than five thousand dollars unaccounted for, it would seem to be quite clear that they are entitled to collect nothing more from the defendant. These were material averments which the defendant was entitled to support, if he could, by proofs at the trial.

Judgment reversed and cause remanded for a new trial.

We concur: Wallace, C. J.; Belcher, J.; Rhodes, J.; Niles, J.

WILLIAM H HARPER, Respondent, v. SOLOMON HAMER, Appellant.

No. 3352; October 17, 1873.

**Wife's Separate Property.—In an Action for the Possession of Land,** brought by a woman both in her own right and as executrix of her husband, judgment is not to be given vesting the title in her alone as her separate estate if not in accord with the documentary proof at the trial.

**Community Property—Debts of Decedent.—Property Acquired by Either Spouse** during the marriage, under a deed of bargain and sale reciting a valuable consideration, is prima facie community property, and is assets in the hands of the executor or administrator of the husband for the payment of debts.

APPEAL from Third Judicial District, Alameda County.

Action of ejectment.

Wm. W. Chipman for respondent; Clarke & Carpentier for appellant.

CROCKETT, J.—The proof shows that on the thirty-first day of October, 1853, the legal title to the demanded premises was in C. C. Bowman and E. S. Chipman, who on that day conveyed it by deed reciting a consideration of seven hundred dollars to W. H. Harper, one of the original plaintiffs in this action, and the husband of the other plaintiff; that on the 15th of August, 1855, Harper, by a deed reciting a consideration of eighteen hundred and seventy-five dollars, conveyed said premises to his brother Frederick P. Harper, who, on the 25th of December, 1855, by a deed of bargain and sale, reciting a consideration of fifteen hundred dollars, conveyed them to the plaintiff, Sarah E. Harper. It further appears that W. H. Harper died after the commencement of this action; and on the suggestion of his death the court entered an order to the effect that the action be continued in the name of Sarah E. Harper, in her own right and also as executrix of W. H. Harper, deceased. The court found as one of the facts that at the commencement of the action the plaintiff Sarah E. Harper "was the sole and separate owner

in fee simple" of the premises in controversy, and entered judgment for her in her own separate right, dismissing the action so far as it was prosecuted by her in her capacity of executrix. The defendants moved for a new trial on the ground, amongst others, of the insufficiency of the evidence to justify the judgment and decision; and under this head specified in the statement in support of the motion, "that the evidence shows the legal title to the demanded property, if in either of the plaintiffs at the institution of the suit, was in Wm. H. Harper." If there was any evidence in the cause tending in any degree to show that the title was in Mrs. Harper as her sole and separate estate, it was the duty of the plaintiff or her counsel to see that it was embodied in the statement on motion for new trial. But none such appears. Her case on this point, so far as it appears from the statement, rests wholly on the conveyances, all of which are deeds of bargain and sale, reciting a valuable consideration. There is nothing to show that the consideration paid was her separate estate, or that no consideration was, in fact, paid. On the contrary, the deeds were left to speak for themselves, without any explanation whatever. The plaintiff, it is true, offered to introduce some explanatory evidence, which was ruled out by the court and is not in the case. Her rights, therefore, must be determined by the face of the conveyances. It is too well settled to merit discussion that in this state property acquired by either spouse during the marriage under a deed of bargain and sale, reciting a valuable consideration, is prima facie community property, and is assets in the hands of the executor or administrator of the husband for the payment of debts. As the facts are here presented, the right of action was in Mrs. Harper in her capacity of executrix, and not in her own right. The motion for a new trial ought, therefore, to have been granted.

Judgment and order reversed and cause remanded for a new trial.

We concur: Rhodes, J.; Belcher, J.; Wallace, C. J.; Niles, J.

A. HIMMELMANN, Appellant, v. O. D. SHERMAN, Respondent.

No. 3549; October 20, 1873.

**Appeal—Sufficiency of Evidence.—When No Motion for a New Trial** was made before the court below, the question of whether the judgment was justified by the evidence will not be considered on appeal.

**Appeal—Presumptions.—When There are No Findings in Writing,** every fact within the issues presented by the pleadings which are necessary to support the judgment will be presumed, on appeal, to have been found in favor of the prevailing party.

APPEAL from Third Judicial District, San Francisco County.

I. C. Bates for appellant; C. A. Lon and D. H. Whittemore for respondent.

BELCHER, J.—This action, which was for a street assessment in the city of San Francisco, was tried by the court without a jury, and judgment was rendered in favor of the defendant. No written findings were requested or filed, nor was there any motion for a new trial. The appeal is from the judgment, and is based upon a statement which specifies certain alleged errors in the admission of testimony and that the decision and judgment are not supported by the evidence.

It is settled that, when there has been no motion for a new trial, this court will not consider the question whether the judgment was justified by the evidence: Reed v. Bernal, 40 Cal. 628.

It is also settled by a large number of decisions that, when there are no findings in writing, every fact within the issues presented by the pleadings which is necessary to support the judgment will be presumed to have been found in favor of the prevailing party.

Among the issues presented in this case was, first, whether the board of supervisors ever adopted a resolution declaring their intention to order the work to be done; and, second, whether any such resolution was ever published by order

of the board, or at all. These issues, being found for the defendant, are decisive of the case, and the judgment must be affirmed.

So ordered.

We concur: Crockett, J.; Niles, J.; Wallace, C. J.; Rhodes, J.

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## SILAS A. STONE, Respondent, v. LOUIS A. GARNETT, Appellant.

No. 3677; October 22, 1873.

**Vendor and Vendee.—When a Written Receipt for Money Paid Contains a "guaranty" that the payee will make a title in the payor to the enumerated premises paid for, which title is not yet in himself, it is the payee's duty to make in the payor the title contemplated by him within a reasonable time after obtaining it.**

**Vendor and Vendee.—When a Man has Obligated Himself by Contract to Execute a Deed to another, it is not essential to a demand upon him preliminary to instituting suit on the contract that this other present, for him to execute, a deed of the precise nature he had contemplated giving or could be made to give.**

APPEAL from Fifteenth Judicial District, San Francisco County.

The appeal was from an order setting aside a nonsuit and granting a new trial. Garnett was a broker and owed money to Savary & Company, who supplied him with vegetables for his table; these creditors had agreed to take in payment of the debt an interest in mines, etc. The agreement was, at the trial, marked "Exhibit A" and its language was as follows:

"Rec'd, San Francisco, 5 March, 1863, of Savary & Co. $2,000 in payment of a one fourth ¼ interest in the above list of claims in Silver Mountain District, and a like interest in the ½ of ranch and mill-site, and hereby guarantee him a title to the same or to return the money."

This was written under an enumerated list of properties and was duly signed by Garnett. Subsequently it was as-

signed to the plaintiff. The complaint asked for alternative relief responsive to the last clause of the agreement. Briefly, the errors assigned principally on the motion for a new trial were that the evidence at the trial had shown (1) that the defendant had agreed to effect a conveyance of the properties by deed, (2) had covenanted to pay back the money on failure so to convey, (3) had not so conveyed, (4) had refused so to pay back, (5) had no title to the property mentioned in Exhibit "A," (6) a proper demand for a conveyance or the return of the money, and (7) a proper tender of a deed for execution.

J. C. Stebbins and G. F. & W. H. Sharp for respondent; Wright & Hoge and S. M. Wilson for appellant.

By the COURT.—The "guaranty" of Garnett was to make to the assignors of the plaintiff a title to the mining claims enumerated in the receipt. The circumstances go to show that the title was to be such a title as Garnett expected to obtain, and did ultimately obtain, from Wakelee. It was the duty of Garnett to convey that title within a reasonable time after he obtained it. The demand made by the plaintiff, that Garnett execute the deed (Exhibit "B") prepared by the plaintiff, was a sufficient demand to put the defendant in default for the purposes of this action, because it was not the duty of the plaintiff to prepare and tender a deed to be executed, and even though the defendant might lawfully refuse to execute a deed such as the one presented, it was, nevertheless, his duty to cause to be prepared and to execute to the plaintiff such a deed as would be sufficient to vest in the plaintiff the Wakelee title to the mining claims referred to.

Order affirmed.

SELIM FRANKLIN, Respondent, v. THEODORE LE ROY, Appellant.

No. 3504; November 6, 1873.

**Appeal—Specification of Error.—On Appeal from an Order Denying** a motion for a new trial, the court will not consider a point as to which there is no specification in the statement on motion.

**Ejectment—Right of Mortgagee to Withhold Possession.**—In an action of ejectment the defendant cannot withhold the possession by proof of a mortgage to him, proceedings in foreclosure, judgment not yet enforced by sale, and his holding under a stipulation so to hold for a year, delaying the sale for so long to eke out the debt from the profits, if possible, when the year has expired long since and the statute of limitations intervened, and the plaintiff is not the mortgagor.

**Mortgage Foreclosure.—An Order for the Sale of Mortgaged Premises,** after proceedings had to foreclose the mortgage, may be applied for only in the court which rendered the decree of foreclosure.

APPEAL from Fourth Judicial District, San Francisco.

Delos Lake and McCullough & Boyd for respondent; W. H. Patterson for appellant.

RHODES, J.—This is an action of ejectment. The defendants pleaded several defenses and filed a cross-complaint. The court adjudged that the defendant Le Roy (the other defendants being his tenants) take nothing by his cross-complaint, and that the plaintiffs recover the possession of the premises, etc. The defendant's claim to relief on his cross-complaint is based on a state of facts substantially as follows: Samuel Philips, being the owner of the premises, mortgaged the same, together with other lands, to Le Roy and Ritter, to secure the payment of a promissory note mentioned in the mortgage. The mortgage was foreclosed in the district court of the twelfth judicial district on the fifth day of March, 1859, and soon after the date of the decree the parties thereto entered into a stipulation, by which it was agreed that Le Roy should take charge of the premises, rent the same and collect the rents, and apply the proceeds to the payment of the judgment, after paying taxes, etc.; that the order of

sale upon the decree of foreclosure be stayed for the period of eighteen months from the date of the decree, and that if any portion of the judgment remained unpaid at the expiration of that time, an order of sale issue for the sale of the mortgaged premises. On the tenth day of September, 1860, another stipulation of the same character was entered into between the parties, by which it was, among other things, agreed that Le Roy should have the management of the premises, as provided in the first stipulation, and that the order of sale be stayed for the period of twelve months from the fifth day of September, 1860, and that if at the end of that time any portion of the judgment remained unpaid, an order of sale should be issued for the sale of the mortgaged property. It is alleged in the cross-complaint that in pursuance of those stipulations Le Roy entered into possession of the mortgaged premises, and has ever since continuously been in the possession thereof, and that there remains due on the decree, after the application of the rents, the sum of nineteen thousand two hundred and fifty-two dollars and nine cents. No order of sale was issued after the expiration of the time mentioned in the second stipulation. The plaintiffs acquired their title to the premises after the execution of the mortgage. Le Roy is the owner of the debt which was secured by the mortgage. There are other facts stated in the cross-complaint, but they have no bearing upon the questions we shall consider.

The prayer is that Le Roy be adjudged to be the owner in fee of the premises, and if such relief cannot be granted, that an order of sale be issued for the sale of the premises, for the satisfaction of the amount due to Le Roy on the decree of foreclosure.

The court having rendered judgment for the plaintiff for the possession of the premises and mesne profits, the defendant moved for a new trial, and assigned the following grounds: 1. That the court erred in not rendering judgment for the sale of the premises for the satisfaction of the defendant's judgment; and 2. That the court erred in holding and deciding that the remedy of the defendant to enforce payment of his judgment was barred by the statute of limitations.

The argument here has not been confined to the specifications, but has taken a wider range. The defendant's first point is, that if he was not in possession as trustee after the

expiration of the period mentioned in the second stipulation, with the right to retain the possession until his judgment was paid, then he was holding adversely, and his plea of the statute of limitations should have been sustained. Without entering into a consideration of the manner in which he held the possession, the obvious answer to the point is, that that defense is a legal defense, and the issue arising thereupon is an issue of fact; and that the question in respect to that issue, to be presented on the motion for a new trial, is whether the decision of that issue was justified by the evidence—that is, whether the evidence required a finding in his favor on that issue. There is no specification in the record which, even by a very liberal construction, will cover that ground.

The second point is that the contract evidenced by the stipulations above mentioned constituted "an express continuing trust" which was not affected by the statute of limitations and could not be terminated without payment of the debt; and the remaining point is that the evidence shows a sufficient acknowledgment of the debt to take the case out of the statute of limitations. The specifications are not sufficient to cover either of these points. But waiving that objection, it does not appear from those stipulations that the contract gave the control of the premises to the defendant beyond the periods mentioned in the stipulations. There is no evidence of a verbal agreement to the effect that the defendant should remain in possession of the premises until the debt was paid. Conceding that the defendant proved a sufficient acknowledgment of the debt to take it out of the statute, it does not follow that the defendant is entitled to relief in this action. There being no sufficient agreement entitling him to the possession of the premises, the only relief he could claim would be an order for the sale of the premises. That order should be applied for in the court which rendered the decree of foreclosure. No case is brought to our notice holding the contrary doctrine.

The granting of an order for the sale of the premises would not preclude a recovery of the possession by the plaintiffs founded on their legal title. They might be entitled to the possession, while the defendant was entitled to an order of sale, and they would not be disturbed in their possession until the sale had been made and a deed executed in pursuance of

the sale. The defendant's right to an order of sale is not inconsistent with the plaintiff's right to the possession of the mortgaged premises. The defendant in an action of ejectment is not entitled to any relief upon his cross-complaint, as against the plaintiff, unless the relief, when granted, would preclude the plaintiff, to some extent, from a recovery upon his cause of action, or some portion of it; and if the cross-complaint does not state facts which entitle the defendant to such relief, it should be dismissed.

Judgment and order affirmed.

We concur: Wallace, C. J.; Niles, J.; Belcher, J.; Crockett, J.

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## MARGARET TONG, Respondent, v. LUCINDA RICHMOND, Appellant.

No. 3676; November 21, 1873.

**Appeal—Request for Written Findings—Time to Request.**—Where the statute provides that the failure to file written findings shall not be cause for reversal when such filing was not requested by the appellant at the submission of the cause and the request entered on the court minutes, a failure in this regard is not ground for reversal if the request was made after the court announced its decision but before any judgment was entered.

**Lost Instrument—Proof.—The Contents of a Lost Power of Attorney** cannot be proved by secondary evidence without requisite proof first having been had of the loss of the instrument.

**Possession—Necessity of Inclosure.—If Land is Subjected to the Exclusive Dominion** and control of the possessor, whatever the means used for that purpose may be, there is actual possession; and an inclosure is not indispensable.

APPEAL from Eleventh Judicial District, El Dorado County.

George E. Williams for respondent; George G. Blanchard for appellant.

BELCHER, J.—The action is ejectment to recover the possession of a quarter section of land in El Dorado county. The

case was tried by the court and judgment rendered in favor of the plaintiffs without written findings.

At the conclusion of the trial the cause was submitted, and the court then announced its decision, and thereupon, before any judgment was entered, counsel for defendants requested the court to make and file its findings in writing. This request was refused by the court, and this is the first error assigned.

Section 180 of the Practice Act, in force when this action was tried, provided that "no judgment shall be reversed on appeal for want of a finding in writing at the instance of any party who at the time of the submission of the cause shall not have requested a finding in writing, and had such request entered in the minutes of the court." In this case the request for written findings was not made at the time of the submission of the cause, and we cannot, therefore, for this reason reverse the judgment.

In the progress of the trial the defendants sought to prove the contents of a lost power of attorney, and, upon the objection of the plaintiffs, the evidence was excluded. We see no error in this ruling. The requisite proof of the loss of the paper had not been made.

The quarter section in controversy was public land of the United States, and the right to the possession of it was claimed by both parties. The plaintiffs based their claim upon declaratory statements filed by them upon this and adjoining land in the proper United States land office in 1871, and upon the fact that in April, 1872, they inclosed this quarter section by a fence which, it was admitted on the trial, was sufficient to turn stock. The defendants, on the other hand, claimed and introduced evidence to prove that as early as 1859 or 1860 the defendant, Mrs. Richmond, constructed fences which, in connection with the fences of adjoining owners, inclosed a tract of about four hundred acres, including the premises in controversy, and that she had since that time constantly used the whole tract, to the exclusion of all other persons, for grazing and stock-raising purposes. It appears from the record that the fences about this tract were kept up until some three or four years prior to the trial, when portions of Mrs. Richmond's fence were removed, leaving gaps or openings in it of considerable extent. These gaps re-

mained, but were guarded by two Indian boys employed by Mrs. Richmond, so as effectually to keep her stock in the field and all other stock out.

Without discussing the question whether the defendants had in fact exercised exclusive control over the land, counsel for respondents contend that there could be no actual possession of it without a complete inclosure, and that, therefore, the judgment of the court below was right and should be affirmed here. The error of the argument is in the assumption that an inclosure is necessary to actual possession. Unquestionably there may be actual possession without a complete or any inclosure. It is necessary only that the land be subjected to the exclusive dominion and control of the possessor. Whenever it is so subjected, whatever the means used for that purpose may be, there is a sufficient possession. In this case there was no conflict of testimony upon the question whether Mrs. Richmond had by fences and guards subjected this land to her exclusive control.

There can be no just pretense, and counsel do not appear to claim, that respondents were entitled to recover upon the strength of their declaratory statements alone.

Upon the case presented, we think the judgment was wrong, and a new trial should have been granted.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

We concur: Wallace, C. J.; Rhodes, J.; Niles, J.; Crockett, J.

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MARGARET TONG, Respondent, v. LUCINDA RICHMOND, Appellant.

No. 3676; August 23, 1875.

RHODES, J.—The defendants allege that the court below held "that it was necessary, before the defendants could defeat the action, to show that the lands were entirely inclosed by them before the plaintiff entered." We find nothing in the transcript indicating that the court so held. The state-

ment purports to set out the testimony of the witnesses of the respective parties, but it is so vague and uncertain that it is almost impossible to ascertain what facts were proved. We infer from it that Mrs. Richmond at one time had the possession of the premises in controversy; that subsequently the fences were so much out of repair or removed that cattle and teams could pass across the premises without obstruction; that one Stetson entered upon the premises with the knowledge and assent of the defendants and remained in possession until he sold the same to the plaintiffs; that the plaintiffs thereupon entered and inclosed the premises, and that soon thereafter they were expelled by the defendants. The defendants claim that Stetson entered and held the possession for Mrs. Richmond, while the plaintiffs contend that he held the possession for his own use. If Stetson in fact entered and held the possession for his own use, with the assent of the defendants, and while so in possession conveyed the premises to the plaintiffs, the subsequent entry of the defendants was wrongful. Upon this issue—as to whether Stetson held the premises for himself or Mrs. Richmond—the evidence is manifestly conflicting, and the decision, therefore, will not be disturbed.

The alleged errors of law do not require any particular notice.

Judgment and order affirmed.

We concur: Wallace, C. J.; Niles, J.; Crockett, J.

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E. R. CARPENTIER, Administrator of CATHERINE HAYS BUSHNELL, Deceased, Appellant, v. C. I. BRENHAM et al., Respondents.

No. 3272; December 8, 1873.

**Mortgage—Redemption by Junior Mortgagee—Complaint.**—In a suit brought by a junior mortgagee for the purpose of being allowed to redeem from a sale made in foreclosure of the senior mortgage, the complaint should not be dismissed merely because not strictly in form to reach the end aimed at, provided it is susceptible of being put into proper form by amendment.

**Mortgage—Junior and Senior Mortgages.**—If a mortgage is made upon land on which an earlier mortgage is already due, and subsequently the junior mortgagee would enforce his lien, the land having been sold meantime in foreclosure of the senior mortgage, the latter will be kept alive and deemed to be still in force, with the same effect as though the mortgagor still held the legal title.

**Mortgage—Redemption by Junior Mortgagee—Time.**—If the mortgagee, under a mortgage made after another mortgage on the same land has become due, would redeem from a sale in foreclosure of the senior mortgagee, he must exercise the right to do so within the same period the mortgagor might have exercised it, since his right can be no greater in respect of time than that which the mortgagor himself possessed.

APPEAL from Twelfth Judicial District, San Francisco County.

Wm. H. Patterson, J. T. Boyd and Clark & Carpentier for appellant; Glascock Dwinelle, D. P. Barstow, Blatchley & Brewer, J. B. Harmon, H. P. Irvine, J. S. Bugbee and Williams & Thornton for respondents.

See Carpentier v. Brenham, 50 Cal. 549.

CROCKETT, J.—On the former appeal in this case (Carpentier v. Brenham, 40 Cal. 221) it was decided that notwithstanding the foreclosure of the mortgage to Moss and the sale under it, a court of equity will deem it to be still subsisting and unsatisfied, so far as may be necessary for the protection of the purchasers at the foreclosure sale, as against the junior mortgage to Catherine Hays; and that the only remedy of the junior mortgagee is a bill to redeem from the prior mortgage. This ruling has become the law of the case, and its correctness or incorrectness is not open to review on this appeal. Correctly assuming these propositions to have been settled, the defendants contend that the complaint has none of the characteristics of a bill to redeem, and was, therefore, properly dismissed. But we do not regard it in so narrow a light. Whilst not strictly and in a technical sense a bill to redeem, it is nevertheless capable of the necessary amendment, without materially changing the nature and scope of the action, and the plaintiff would be permitted to amend, if the ends of justice require it. We shall, therefore, for the purposes of this ap-

peal, treat the complaint as sufficient to authorize a decree for redemption, if the facts will justify it.

On the former appeal the questions arising on the statute of limitations were not before us, but as the facts are now presented, the plaintiff contends that the mortgage to Moss and the rights which the defendants claim under it are barred by the statute, and consequently that he is under no obligation to redeem from a defunct mortgage. On the other hand, the defendants insist that when the debt to Moss became due, the statute commenced to run against the right of Hays to redeem, and had fully run before the commencement of the action.

All that the junior mortgagee acquired by her mortgage was a lien on the land, subject to the lien of the prior mortgage, which had then become due. The statute had already commenced to run against the right of the mortgagor to redeem from the prior mortgage, or, to use a more accurate phrase, against his right to pay off the mortgage debt and demand a release of the mortgage. When Moss obtained the sheriff's deed under his foreclosure sale he acquired the legal title as fully for all purposes as though it had been conveyed to him directly by Brenham, the mortgagor, after the execution of the junior mortgage. He took it, however, subject to the then existing lien of the junior mortgage. But, as we decided on the former appeal, he will be treated in a court of equity, and as against the junior mortgagee, as sustaining a twofold relation toward the property; first, as the holder of the legal title, good as against all the world, except the junior mortgagee; and, second, as the holder of the prior mortgage, which, as against the junior mortgage, a court of equity will keep alive and deem to be unsatisfied, notwithstanding the foreclosure and sale under it. The rule is founded on the plainest principles of justice and equity, and is abundantly supported by the authorities. If it were otherwise, the holder of the prior mortgage, by the mere act of taking from the mortgagor a conveyance of the legal title, would extinguish his mortgage and give priority to the junior mortgage. To avoid this injustice, courts of equity have established the rule that, when the junior mortgagee, under such circumstances, seeks to enforce his lien, the prior mortgage will be kept alive, and will be deemed to be still in force, with

the same effect as though the mortgagor still held the legal title.

What, then, were the relations which Moss and Hays sustained toward each other in a court of equity on the fourth day of September, 1857, when Moss obtained the sheriff's deed under the foreclosure sale? The rights of neither were prejudiced by the foreclosure and sale. Hays had precisely the same but no other rights than if there had been no satisfaction or foreclosure of the prior mortgage; and Moss was in the same condition, except that he had acquired the legal title. As between them equity will treat the foreclosure and sale as nonexistent, except in so far as it recognizes the fact that Moss has acquired the legal title of the mortgagor. Within what period, then, was it incumbent on Hays to commence proceedings, in order to avoid the bar of the statute of limitations? Did the statute commence to run against her from the time when the debt to Moss became due, or only from the time when her own debt became due? As between Hays, the junior mortgagee, and Brenham, the mortgagor, it is clear the statute would not begin to run until the maturity of the mortgage debt. But that is not the question here. The point with which we have to deal is the time at which the statute commences to run in favor of a prior mortgage against a junior mortgagee seeking to redeem, or in other words, to have the mortgaged premises sold and the proceeds applied toward the satisfaction of the mortgages according to their priority.

That Brenham, the mortgagor, could have maintained an action to redeem from the Moss mortgage immediately on its maturity, and that he was bound to sue within four years thereafter, on pain of being barred of his right to maintain the action, is perfectly clear. In such cases the right of the mortgagee to foreclose and of the mortgagor to redeem are correlative, and must be prosecuted within the same time: Cunningham v. Hawkins, 24 Cal. 403, 85 Am. Dec. 73; Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722; Espinosa v. Gregory, 40 Cal. 58. Nor have I any doubt that a junior mortgagee stands upon the same footing. His right to redeem rests upon the ground that he has an interest in the fund which is held as a security for both mortgages; and for the protection of that interest he is entitled either to pay off

the first mortgage and be subrogated to the rights of the mortgagee, or to insist upon a sale of the mortgaged premises and the application of the proceeds toward the satisfaction of the mortgages in the order of their priority. But this right must be exercised, if at all, within the same period within which the mortgagor might have exercised it. The right of the junior mortgagee to redeem can be no greater in point of time than the mortgagor himself possessed. If Brenham, after the mortgage to Moss became due, had conveyed the fee by absolute deed to Hays in satisfaction of her demand, it is clear beyond controversy that she could not have redeemed from the Moss mortgage, except within four years from its maturity, even though but a single day had remained for the redemption after she received her deed; and if the time for redemption had then fully expired, she could not have redeemed at all. She would have succeeded to Brenham's rights precisely as he held them, and not otherwise. If such would have been her status under an absolute conveyance of the fee, it is not easy to perceive how she could have acquired greater rights by the taking of a junior mortgage which, at most, was only a lien on such title as the mortgagor then had. If Brenham could not have extended the time for redemption by an absolute conveyance of his entire interest in the land, I know of no principle of law or equity by which he could have accomplished that result by the conveyance of a lesser interest or the creation of a mere lien upon such title as he had. But on the opposite theory, whilst it is conceded that the mortgagor cannot himself maintain an action to redeem, except within four years from the maturity of the mortgage debt, it is nevertheless claimed that he may extend the time for redemption indefinitely by the making of successive mortgages to mature at remote periods. It has been suggested as an answer to the apparent hardship which this would impose upon the prior mortgagee, that he may at any time cut off the right to redeem by a foreclosure of his mortgage, bringing in all the subsequent encumbrancers. But possibly he may be in possession under a conveyance of the legal title, and may have no motive to foreclose his mortgage; or he may not consider the property worth the cost of a foreclosure suit, and for many other reasons might not deem it to his interest to foreclose. I think he may stand upon

his rights as they were when his mortgage debt matured; and that, inasmuch as the mortgagor could not himself maintain an action to redeem, except within four years from that time, he cannot extend the time for redemption by the making of one or more subsequent mortgages to mature at a later period. The present action was, therefore, commenced too late, and is barred by the statute of limitations.

This view of the case renders it unnecessary to notice the other points made by counsel.

Judgment affirmed.

We concur: Rhodes, J.; Belcher, J.; Niles, J.

Wallace, C. J., having been of counsel in the court below, did not sit in this case.

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## WILLIAM W. CHIPMAN, Respondent, v. SAMUEL A. HASTINGS, Appellant.

No. 3474; December 8, 1873.

**Ejectment—Answer not Demurrable.**—An answer in ejectment setting up a perfect legal title in fee in a person from whom the defendant claims, the death and intestacy of this person, a forged will by the person from whom the plaintiff claims, his fraudulent acquisition thereby, and notice of the fraud had by the plaintiff and his grantors, cannot successfully be demurred to, since the demurrer admits these allegations to be true.

**Cotenancy—Limitations of Actions.—Under the Rule That if One** of several tenants in common labors under a disability which preserves his rights under the statute of limitations, this will not inure to the benefit of his cotenants against whom the statute has fully run, if the tenant under disability brings his action against the disseizor for the possession, he can recover only his undivided interest.

**Limitation of Actions—Time to Raise Objection.**—Where there is no express showing that the filing of an amended answer after the complete running of the statute of limitations was done without leave of court asked and obtained, but so far as the record discloses without objection by plaintiffs, objection cannot be made for the first time on appeal.

APPEAL from Third Judicial District, Alameda County.

Wm. W. Chipman in pro. per.; Clarke & Carpentier for appellant.

See Chipman v. Hastings, 50 Cal. 310.

CROCKETT, J.—The action is ejectment, and the demanded premises are included within that portion of the "Rancho de San Antonio" which has been finally confirmed to Antonio Maria Peralta, one of the sons of Luis Peralta, deceased, to whom the rancho was originally granted. The plaintiff claims under the confirmee, Antonio Maria, and the defendant under the daughters of the original grantee, Luis Peralta. The case of Minturn v. Brower, 24 Cal. 644, was also an action of ejectment for a portion of the tract confirmed to Antonio Maria Peralta, and in that case, as in this, the plaintiff claimed under the confirmee and the defendants under the daughters of the grantee. In each case the answers allege as matters of equitable defense that Luis Peralta died intestate, seised in fee of the land, and that his title descended to his four sons and to his four daughters and to the issue of a deceased daughter in equal portions; that the four sons, in fraud of the daughters, procured the title to the whole rancho to be confirmed to them in severalty, to the exclusion of the daughters; that in support of their alleged right to a confirmation they put in evidence before the land commission and the district court of the United States a forged and simulated will of Luis Peralta, deceased, purporting to devise the entire rancho to the four sons; that the confirmation was procured by means of these fraudulent practices, of which, it is alleged, the plaintiffs, and all those through whom they deraign title, had notice before taking their conveyances. In each case the prayer is that the plaintiff be decreed to be a trustee, holding the title derived under the confirmation in trust for the defendants to the extent of the interest acquired by them from the daughters of Peralta. There is no substantial difference between the equitable defenses set up in the two actions, and in each of them the court below sustained a demurrer to this portion of the answers. In Minturn v. Brower this court held the answer to be good, and reversed the action of the court below in sus-

taining the demurrer. The ground of the decision was that the demurrer admitted the averments of the answer to be true, and from these averments it appeared that Luis Peralta, at the time of his death, was seised in fee of the land, having a perfect legal title thereto, which needed no confirmation by the tribunals of the United States; that having the fee, his title was protected by the treaty of cession and by the law of nations, and could not be devested by a failure to present it for confirmation; that, if he died intestate, as the answer alleged, the title descended to his heirs at law. In the present case the answer avers that the supreme court of the United States, in adjudicating the title of Luis Peralta on appeal, adjudged that his title to the land in controversy "was a perfect legal title in fee." The demurrer admits the truth of this allegation and that Peralta died intestate. It also admits the averments touching the simulated will and notice to the plaintiff and his grantors. There being no substantial difference between the equitable defenses set up in the two actions, the decision in Minturn v. Brower is decisive of this point in the present action. But it is suggested by counsel that the authority of Minturn v. Brower on this point has been shaken by the later case of Banks v. Moreno, 39 Cal. 238. In that case, however, the point we are now considering did not arise. The question there was, whether on the title papers of Luis Peralta, which were put in evidence at the trial, he held a perfect legal title in fee or only an inchoate, imperfect, or, as it is sometimes styled, an equitable title. We held it to be of the latter character on the title papers as then presented. But in the present case, as in Minturn v. Brower, the demurrer admits that he held a perfect legal title in fee, and in each case the plaintiff relied upon the statute of limitations as a bar to the equitable defense. We are unable to discover any substantial difference between the two cases, so far as relates to the equitable defenses; and on the authority of that case we hold that the demurrer ought to have been overruled.

It appeared, however, at the trial that the female plaintiff, who is the real party in interest, owned only an undivided half of the land under the title derived from Antonio Maria Peralta to the demanded premises as a tenant in common with one Poland, who owned the other undivided half. It further ap-

have been in possession at the commencement of the action, and the nonsuit should have been granted as to him on that ground. The general issue pleaded put the plaintiff to proof of the possession of all of the defendants, and its operation in this respect was not affected by the other defenses separately pleaded. But irrespective of this, the case of the plaintiff failed not only as to the defendant Rainsfield, but as to the other defendants also, because Harvey Dickenson, through whom the plaintiff claims, does not appear from the record before us to have had the legal title to the premises at any time—nor such a possession as would support a recovery by the plaintiff. At the time of the levy of the attachment Dickenson was in possession, it is true, but his possession came from Rainsfield as owner, and under an agreement with the latter for the future purchase of the premises for two thousand five hundred dollars—to be paid thereafter, and the payment of forty-five dollars per month as interest in the meantime, until the two thousand five hundred dollars should be paid. After the levy of the writ of attachment, Dickenson, having failed to pay the purchase money, pursuant to the contract surrendered the possession to Rainsfield, whose tenants, the other defendants, were in possession at the commencement of the action. The interest and possession of Dickenson, such as it was, held by him at the time of the levy of the writ of attachment, having terminated by reason of his default in making the payment required by the agreement to purchase, the claim of the plaintiff derived from Dickenson through the sheriff's deed under the McKenzie judgment of necessity failed.

Judgment reversed and cause remanded.

SETH GILL, Jr., Respondent, v. WILLIAM O'CONNELL, Appellant.

No. 3902; February 4, 1874.

**Mortgage—Description of Premises—Parol.**—In order to identify premises as being those described in a mortgage deed by a tract name, although respect must be had first to the description in the deed, the premises are to be located as within the limits of the tract as known when the instrument was delivered, rather than as ascertained by a subsequent survey because adjudicated upon by the United States court, and parol evidence is admissible for this purpose.

**Trial.—An Objection to the Mere Form of Testimony,** in order to sustain an erroneous ruling of the trial court excluding the testimony on its merits, will not be considered when raised for the first time on appeal.

APPEAL from Fifteenth Judicial District, San Francisco County.

B. S. Brooks for respondent; W. H. L. Barnes for appellant.

WALLACE, C. J.—The action is ejectment, and the plaintiff derives title from Victor Castro by deed bearing date in 1864. In order to show a right of entry in Castro, derived to himself by the deed, he proved that Castro, being at the time in the possession of the premises, demised them to the defendant for the term of one year, with the privilege to the lessee of a further term of five years upon a rent reserved in the lease. The lease bore date in 1855, and the defendant entered into possession thereunder in 1856, and has since then continued in possession.

One of the defenses relied upon by the defendant was that he had himself acquired the title of his lessor, the grantor of the plaintiff.

The title set up by the defendant originates in a mortgage deed, executed by Castro to one Leonard in the year 1853, and duly recorded at that time. By this instrument Castro mortgaged to Leonard "all the right, title and interest which the said Castro has either in law or equity in the ranch in Contra Costa county, on a part of which Castro resides, which is usually called the Rancho San Pablo, and which interest is

held by said Castro in common with himself, his seven brothers and sister and their descendants, which is to embrace all the said Castro's improvements on the same, with all the appurtenances thereunto belonging." This mortgage was afterward foreclosed by judicial decree, and the title of the defendant is derived from the purchaser at the sheriff's sale. The defendant claimed that the demised premises, for the recovery of which this action is brought were included in the mortgage and the decree of foreclosure, and the principal question arises upon the ruling of the court below, by which his evidence upon that point was excluded at the trial. The premises in controversy are known as "Gill's Point," and are bounded on the north, south and west by the waters of the bay of San Francisco, and on the east by the marsh lands which separate it from the west line of the Rancho San Pablo, as that line is defined in the final survey of the rancho confirmed by the United States authorities in November, 1864. It will be observed that the mortgage deed from Castro to Leonard was of the interest of the former in the tract usually called the Rancho San Pablo, and embraced all the said Castro's improvements on the same. The Mexican grant of the San Pablo Rancho was of the quantity of three square leagues within exterior boundaries of larger area, and at the time of the execution of the mortgage the definitive location of the quantity granted was yet to be made by the federal authorities. The defendant put in evidence the grant and the diseño exhibiting the exterior boundaries, and called Governor Alvarado as a witness, who, having stated that he had known the rancho for some thirty-six years, was asked by the defendant to state the exterior boundaries of the rancho, as they were understood to be from 1850 to 1857. This evidence was objected to, on the ground that the proceedings and decree in the courts of the United States in locating the grant must be taken as concluding the parties upon the matter inquired of. The defendant then offered to show by the witness that he, the witness, knew where the lines of the San Pablo ranch ran according to the diseño in evidence, and that the premises in controversy are within those exterior limits, and that when the defendant entered under the lease from Castro, and for many years previous thereto, the premises in controversy were within the exterior limits of the rancho as granted, and that Castro occupied and held the premises in

controversy, and made improvements on them, as being part of that rancho which he held in common with his brothers and sister as heir of his father, Francisco Maria Castro, the grantee. The plaintiff objected to this evidence, and the objection was sustained by the court, on the ground that the true limits of the rancho having been fixed by the adjudication of the survey in the circuit court of the United States, the judgment rendered by that court is the better evidence. The objection, as to the mere form in which the offer was made now brought forward by the counsel of the plaintiff in support of the ruling of the court will not be considered. If intended to be relied upon at all, it should have been first made in the court below, where the mere form of the offer might have been readily limited or changed to a more specific form, in order to obviate an objection of that character. The ground upon which the objection was made by counsel at the trial and sustained by the court had no reference to the form in which the offer was made, but was, as already stated, that the final decree by which the survey was determined was the better evidence of the boundaries of the grant for the purposes of this action. In considering the propriety of the ruling of the court upon this point, it is not necessary now to determine whether it would have been correct had the mortgage to Leonard in terms embraced only the interest of Castro in the San Pablo rancho, for, without laying any stress upon the circumstance that the reference found in the mortgage is to an entire tract of land usually called by that name, it also includes all the said Castro's improvements on the same.

Now, if, at the date of the mortgage to Leonard, Castro was in possession of a tract of land in Contra Costa county, called Rancho San Pablo, and if he had at the time certain improvements thereon then existing, it is apparent that the description contained in the mortgage was intended by the parties to apply, and would apply, to the lands so in his possession upon which his improvements then existed. The circumstance that the United States authorities had subsequently to the mortgage ascertained and fixed the precise location of the quantity of land granted, and, in so doing, had excluded from such location certain lands which were at the date of the mortgage in the possession of Castro, and which were then known by the name of Rancho San Pablo, and had also excluded lands upon

which Castro had his improvements when he delivered the mortgage deed, could not operate in favor of Castro or his grantee, the plaintiff here, to defeat the operation of the mortgage upon such excluded lands.

The judgment of the United States circuit court finally locating the premises certainly did not assume to determine that the tract of land in Contra Costa county, called Rancho San Pablo, did not, in the year 1853, embrace boundaries more extended than those which formed the limits of the final survey, as fixed by that court, and especially it did not determine that in 1853 Castro had no improvements within the exterior lines of the rancho and upon portions of the general tract excluded by the final survey. If effect, then, is to be given to the mortgage deed, as between the parties to it and those who come to claim under them subsequent to its delivery, it is clear that the mortgage lien must be considered to have attached to the premises referred to in the mortgage deed as being those upon which it was intended to operate.

In order to identify the premises in controversy as being the premises described in the mortgage deed, respect must, of course, first be had to the description found in that deed. The mortgaged premises must be taken to be only such premises as were within the general limits of the tract of land called the Rancho San Pablo, as those limits were recognized in 1853, at the time the mortgage deed was delivered. Parol evidence could not, therefore, be resorted to for the purpose of extending the description, so as to embrace lands without, or not shown to be within, those limits. But we think that with this qualification it is competent to the defendant to establish by parol that "Gill's Point" was, in fact, occupied or possessed by Castro in 1853, or that he then had improvements there. If such be the fact, then the mortgage lien became impressed upon such interest as the mortgagor had therein, whether that interest was in fee or of a less estate, or was only such interest as resulted from the actual possession of the mortgagor and the lien of the mortgage, and the effect of its foreclosure was not displaced or disturbed, as between the parties or those claiming under them, by the circumstance that the final survey of the rancho subsequently made excluded a portion or all the premises included in the mortgage deed.

For the error in excluding the evidence offered by the defendant in this respect, the judgment must be reversed and the cause remanded for a new trial, and it is so ordered.

We concur: Crockett, J.; Niles, J.; Rhodes, J.

Mr. Justice McKinstry, being disqualified, did not participate in the decision of this cause.

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## ORRIN SIMMONS, Administrator, Appellant, v. ADOLPHUS HOLLUB, Respondent.

No. 3078; March 18, 1874.

**Public Administrator.—The Bar of the Statute of Limitations, as to lands in the hands of a public administrator, is not complete against one with a right of entry until two years after their passing out of his hands.**

APPEAL from Probate Court, San Francisco County.

B. S. Brooks for appellant; Bartlett & Pratt for respondent.

CROCKETT, J.—The substance of the complaint in this case is, that in the year 1850 one Bezar Simmons died intestate, seised of numerous lots of land situate in the city of Sacramento, the title to which he derived from John A. Sutter, to whom they were granted by the Mexican government; that Sutter's title was finally confirmed by the courts of the United States in the year 1865, and a patent was duly issued in the year 1866; that in the year 1861 Hollub, who was then the public administrator of the city and county of San Francisco, was duly appointed and qualified as the administrator de bonis non of the estate of Simmons, and continued to be such administrator until November, 1869, when he was removed and the present plaintiff was appointed to succeed him; that during the whole term of Hollub as administrator the said lots were in the actual, adverse possession of persons without right or title, and Hollub took no steps to recover the possession until the right of entry had become barred by the statute of limita-

tions, and by this means the property was lost to the estate. The action is against Hollub and his sureties on his bond as public administrator to recover the value of the property thus alleged to have been lost to the estate by the bar of the statute through the negligence of the administrator.

A complete answer to the action is that under the decision in Gardiner v. Miller [47 Cal. 570], No. 2569, at the present term, the right of entry was not barred by the statute of limitations, when Hollub was removed, nor until about two years thereafter. The demurrer to the complaint was, therefore, properly sustained.

Judgment affirmed.

We concur: Niles, J.; Wallace, C. J.; McKinstry, J.

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F. W. PATY, Appellant, v. J. R. SMITH, Respondent.

No. 2941; March 20, 1874.

**Guardian—Jurisdiction of Probate Court.**—Under the judicial system in California, jurisdiction of the person and property of an infant is conferred upon the probate court.

**Guardian—Appointment by Legislature.**—The constitution of California gives the legislature of the state no power to appoint a guardian for an infant.

APPEAL from Twelfth Judicial District, San Francisco County.

Barstow, Stetson & Houghton for appellant; Daingerfield & Olney for respondent.

See Paty v. Smith, 50 Cal. 153.

McKINSTRY, J.—Respondent asked for a rehearing on the ground that the act of the legislature, which purports to authorize a sale of the property of the plaintiff—then a minor—and the proceedings under it, transferred his title in the demanded premises to the grantor of the defendant. It is highly probable that the jurisdiction of the chancellor over

the persons and property of infants had its foundation in the prerogative of the crown, flowing from the general duty of the king—as parens patriae—to protect those who had no other lawful protector. The prerogative was exercised in the court of chancery, because it partook more of a judicial administration of rights and duties in foro conscientiae, than a strict executive authority: 2 Story's Equity, 1333, 1334. In the United States the appointment of guardians and their supervision seems always to have been regarded as a judicial power, and has generally been confided to judicial officers. Under our system in California the general law confers the jurisdiction on the probate courts.

Special laws providing for the sale by the guardian (of the person or property) of the real estate of the infant have been upheld by the courts of several of the states. But the legislative body under the charter in Rhode Island possessed judicial powers; and this is likewise true of the general court of Massachusetts, in the reports of whose courts many of the cases referred to are found. In subsequent cases to those in which the power of the legislature was recognized in New York, the whole doctrine has been doubted, if not disapproved; and elsewhere resort has been had to much ingenious refinement to escape the effect of a provision in the state constitution analogous to article 3 of our own. In most instances, also, the act provided that the guardian or trustee should be controlled, and his action directed and approved by a court of competent jurisdiction.

It is true that the fourth section of the act now before us declares: "That no deed [made under the provisions of the act] shall be valid, or convey any title, unless the sale shall have been confirmed by the probate court previous to the execution of such deed of conveyance." But the person named in the act was not appointed guardian by any judicial authority in this state, and gave no bond to secure the due application of any fund which might come to her hands. The judge of probate was given power to disapprove of a sale, that is, to require that a larger sum should be realized and paid to the guardian, so called; but had no authority to interpose for the protection of the infant, by directing or supervising the use of the proceeds.

In California the precise question involved in this case has never before been presented; and as the power is a judicial power, we feel constrained to hold, upon the plain language of third article of the constitution, that it cannot be exercised by the legislative department of the government.

Judgment and order denying new trial reversed and cause remanded.

We concur: Rhodes, J.; Crockett, J.; Niles, J.

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JERRY DECKER, Respondent, v. I. N. CAIN, Appellant.

No. 3284; March 21, 1874.

**Sale—Change of Possession.—A Sale, in Order That Its Subject may not be open to seizure for the debts of the seller, must be followed by a change of possession.**

APPEAL from Tenth Judicial District, Colusa County.

This was an action of replevin to recover a lot of cattle claimed by the plaintiff to be his. They had been taken by a sheriff in execution of a judgment against brothers of the name of Schultz and when seized were, with many other cattle variously owned, on an island occupied by one of the brothers and were branded with the Schultz private mark. The claim was that this Schultz had sold them to Decker, July 4, 1868; however, in the bill of sale given in the transaction the consideration was a promissory note payable in two years. The judgment on which the execution had issued had been recovered June 4, 1868. Decker lived in another county from that of Schultz's residence, was his brother in law and had been his partner in business.

Whiteside & McQuaid and I. O. Goodwin for respondent; Eastman & Merrill and W. F. Goad for appellant.

RHODES, J.—The evidence in this case is insufficient to show such an immediate delivery, and actual and continued

change of the possession of the property, as is required to satisfy the statute of frauds.

Judgment and order reversed and cause remanded for a new trial.

We concur: Crockett, J.; Niles, J.; McKinstry, J.

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## THOMAS JAMISON, Respondent, v. JOAQUIN KING, Appellant.

No. 3577; April 16, 1874.

**Life Insurance.—The Administrator is the Proper Person to Sue** for the recovery of an insurance policy on the decedent's life made out in favor of the insured himself.

**Life Insurance.—An Administrator Suing on an Insurance Policy Assigned** by the decedent on his deathbed may, if his complaint is based on a fraudulent assignment, amend the same so as to have it charge a donation in expectation of immediate death.

**Administrators.—In a Suit by an Administrator Accounts Filed by Creditors,** and allowed as just, may be shown in order to prove that such claims were filed against the estate.

**An Assignment by a Dying Debtor to His Creditor may not After the Death,** if the estate proves to be insolvent, be allowed to benefit the taker up to the full amount of the thing assigned, but the taker is entitled to judgment for so much of it as will satisfy the debt.

APPEAL from Sixth Judicial District, Sacramento County.

The plaintiff was a public administrator to whom had issued letters on the estate of one John King, deceased. The debts were largely in excess of the assets, and the administrator wished to subject to them an insurance policy King had had on his life, made originally payable to himself, which policy the assured had, a day or so before his death, assigned to his brother, the defendant here. The plaintiff's bill was for an injunction to restrain the defendant and his attorney from having the insurance company pay them the policy, and for the setting aside of the transfer, or assignment, and also for the appointment of a receiver to take and hold the

policy, collect it, etc., and pay over the proceeds to the plaintiff to be made part of the general assets. The court allowed, over the defendant's objection, the complaint to be amended. Originally it had been based on a fraudulent assignment, while as amended it charged a donation of the life policy in expectation of immediate death, so that, according to the defendant's contention, the action was changed in its nature. At the trial Joaquin proved he had worked for his brother for more than twenty-eight months without having been paid anything for his services, and that besides he had loaned his brother six hundred dollars, which had not been returned. Other witnesses testified to the efficient help he had been to his brother in his business, while the evidence of a witness to the assignment was that on executing the latter John had remarked upon having overworked Joaquin, and had added, "I must do something for him."

Beatty & Denson for respondent; McKune & Welty for appellant.

See Jamison v. King, 50 Cal. 132.

RHODES, J.—The administrator is the proper person to sue for the recovery of the policy or its proceeds, for the benefit of the creditors of the estate.

There was no error in permitting the plaintiff to amend the complaint in the manner shown by the record. The indorsement on the policy was sufficient to constitute a valid assignment of it to the defendant King.

The accounts filed by creditors of the estate, and allowed by the administrator and the probate judge were admissible in evidence. While they might not be competent proof of the fact or the amount of the indebtedness of the estate, they were proof of the fact that such claims were filed against the estate.

The court found that the indorsement and delivery of the policy "were made in immediate expectation of death, and not solely in consideration of a pre-existing debt, but chiefly as a gift." No fraudulent intent is found. The evidence clearly, and without conflict, establishes the existence of the debt, at the time of the assignment of the policy, and proves that such indebtedness was a part, at least, of the considera-

tion of the assignment. In view of the insolvency of the estate, the defendant King may not be entitled to the benefit of the assignment of the policy as a gift, but he is entitled to the judgment of his debt out of the policy. The judgment, therefore, taking the policy out of his hands, without making provision for the payment of his debt out of the proceeds of the policy or otherwise, cannot be sustained.

Judgment and order reversed and cause remanded for a new trial. Remittitur forthwith.

We concur: Crockett, J.; Niles, J.; McKinstry, J.; Wallace, C. J.

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E. RONDEL, Respondent, v. CALEB T. FAY, Appellant.

No. 2706; April 16, 1874.

**Appeal.—A Verdict Given on Testimony Substantially Conflicting will not be disturbed.**

APPEAL from Twelfth Judicial District, San Francisco County.

Quint & Hardy for respondent; G. F. & W. H. Sharp for appellant.

RHODES, J.—It was decided in this case on the former appeal (Rondell v. Fay, 32 Cal. 360) that the patent of the state to the North San Francisco Homestead and Railroad Company did not convey any lands lying above high-water mark—that is to say, above the line of ordinary tides. Upon the issue as to whether the lands upon which the trespass was committed were below that line—were tide lands—the evidence was conflicting. The evidence was also conflicting upon the issue as to whether the plaintiff had the possession of the lands described in the complaint. The verdict upon those issues will not be disturbed.

There was evidence introduced by the plaintiff which showed that he had sustained damages by means of the alleged trespass exceeding the amount of the verdict.

Judgment and order affirmed. Remittitur forthwith.

We concur: McKinstry, J.; Crockett, J.; Niles, J.

M. M. TOMPKINS, Appellant, v. J. D. BACON, Respondent.

No. 3826; June 27, 1874.

**Appeal.—Where the Evidence Below was Substantially Conflicting, the judgment thereupon will not be disturbed on appeal.**

APPEAL from Second Judicial District, Tehama County.

P. B. Nagle for appellant; Chadbourne & Lewis for respondent.

McKINSTRY, J.—This action was brought upon an express contract for the demise of the premises described in the complaint. It is alleged that the plaintiff, as administrator, continued in the possession of the lands and improvements described until the —— day of June, 1866, "when plaintiff rented the same to the above-named defendant at the rate of six hundred dollars per annum. That on said —— day of June, defendant promised and agreed to pay plaintiff said sum of six hundred dollars per annum as rent for the said lands and improvements." That under said agreement defendant entered into possession, etc.

The court below held that the agreement alleged was not made or entered into, and that the defendant did not enter under it. As the evidence was substantially conflicting, the judgment should be affirmed.

Judgment affirmed.

We concur: Crockett, J.; Niles, J.; Wallace, C. J.

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NATHANIEL PRYOR, Respondent, v. JOHN G. DOWNEY, MATTHEW KELLER and WALLACE WOODWORTH, Appellants.

No. 3377; August 3, 1874.

**Probate Sales.—The Curative Act of April 2, 1866, "in relation to probate sales," by the use of the words "defects of form, omissions or errors," cannot be construed as embracing such matters as the want of power in the person assuming to act as an administrator or the absence of jurisdiction in the court which ordered the sale.**

APPEAL from Seventeenth Judicial District, Los Angeles County.

Glassell, Chapman & Smith for respondent; James H. Lander and Kewen & Howard for appellants.

See Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656.

RHODES, J.—The plaintiff claims title to the premises in controversy under the will of his father, Nathaniel M. Prior, deceased, and the defendants claim title through a sale and deed made in 1853 by the administrator with the will annexed of said deceased. The proceedings in the probate court were attacked by the plaintiff on many grounds, but we find it necessary to notice only one of them. On the 3d of February, 1851, the court made the following order: "In the matter of the Estate of Nathaniel M. Prior—proof having been made to the court that notice has been given according to law of the application for letters of administration now pending, and no person appearing to contest said application; it is ordered by the court that Thomas Forster be appointed administrator with the will annexed of Nath. M. Prior, and that he give security according to law, and that until the filing of bond the said Thomas Forster is appointed special administrator of said estate." Among the papers of the estate there was found a bond purporting to be the bond of Forster as such administrator, signed by him and one surety; but it was not filed, the surety did not justify, nor did the probate judge approve the bond.

It does not appear that letters of administration were issued to Forster or that he took or subscribed the oath prescribed for administrators. The seventy-second and seventy-third sections of the Probate Act then in force provided that before the letters should issue, the administrator should take and subscribe an oath to perform according to law the duties of administrator, and should execute a bond to the state, with two or more sureties, to be approved by the probate judge. The bond in this case, even if it had been filed, cannot be regarded as the bond provided for by the statute. Whatever may be the rule as to the necessity for proof that letters have in fact issued, in a case where the order for letters was

made, and the appointee qualified and filed his bond and the bond was duly approved, it is beyond all question that in the absence of proof that letters issued, he will not be held to be the administrator, unless he has qualified and given the requisite bond and the bond has been approved by the probate judge. Until these acts are performed, he is not entitled to receive letters; his appointment is in fieri: Estate of Hamilton, 34 Cal. 469. The order in this case speaks the same language. Forster is appointed special administrator until the filing of his bond as administrator with the will annexed. We are, therefore, compelled to hold that he was not the administrator with the will annexed of Nathaniel M. Prior, deceased. The statute did not authorize a special administrator to sell real estate. The probate court, therefore, had no authority to make the order of sale in this case; and in our opinion both the proceedings in the probate court and the administrator's deed are void.

The defendants, however, contend that the objections to the proceedings in the probate court are cured by the act of April 2, 1866, "in relation to probate sales": Stats. 1865–66, p. 824. The act is as follows, omitting the proviso: "In all cases where real estate has been sold in this state, under the order of the probate courts of the several counties, to purchasers in good faith for a valuable consideration, and defects of form, or omissions or errors exist in any of the proceedings, such sales are hereby ratified, confirmed and made valid and sufficient in law to transfer the title of the property sold."

We are not called upon in this case to determine whether "the proceedings" mentioned in the statute should be construed as including anything besides the proceedings for the sale of the real estate; for, in our opinion, the words "defects of form, omissions or errors" cannot be construed as embracing such matters as the want of power in the person assuming to act as an administrator, or the absence of jurisdiction in the court which ordered the sale. Those words are not synonymous with, and do not include a want of, power or jurisdiction. Had the legislature intended to exercise the questionable power of ratifying and confirming all sales made under the orders of courts which had no jurisdiction to make the orders, or made by persons who had no authority to sell

the real estate, the purpose would have been expressed in clear and unequivocal terms. Those words, like all the words of a statute, must be construed as having been used in their ordinary acceptation; and in that sense they do not signify or include a want of power or jurisdiction in the administrator or probate court.

Judgment and order affirmed.

We concur: McKinstry, J.; Niles, J.

CROCKETT, J.—It was admitted at the trial that the will of Nathaniel M. Prior, deceased, was duly probated. This gave the court jurisdiction to proceed with the administration of the estate. But it is said it does not appear that the administrator ever qualified or that letters were ever issued to him; and, moreover, that the petition for the sale of the land omitted to state the necessary jurisdictional facts. It is also claimed that certain other irregularities occurred in the proceedings for the sale of the land.

If all this be conceded, we think the proceedings were validated by the curative act of April 2, 1866, which provides that "in all cases where real estate has been sold in this state, under the order of the probate courts of the several counties, to purchasers in good faith for a valuable consideration, and defects of form or omissions or errors exist in any of the proceedings, such sales are hereby ratified, confirmed and made valid and sufficient in law to transfer the title of the property sold": Stats. 1865–66, p. 824. The defects complained of are only "omissions or errors" in portions of the proceedings which culminated in a sale of the land. There was no fraud in the sale, and the land was sold to a bona fide purchaser for a valuable consideration.

This brings the case fully within the letter and spirit of the curative act. Nor do I think that upon the facts disclosed by the record the legislature had not the constitutional power to validate the proceedings of the probate court and render the deed effectual to pass the title.

I am therefore of opinion that the judgment ought to be reversed.

I concur: Wallace, C. J.

CITY AND COUNTY OF SAN FRANCISCO, Respondent, v. T. I. A. CHAMBERS, Appellant.

No. 3415; August 3, 1874.

**Street Improvements—Publication of Notice.**—The statute controlling the award of contracts for the improvement of streets does not provide who shall cause the notice of the award to be published.

**Street Improvements—Publication of Notice.**—The statute controlling the award of contracts for the improvement of streets requires that "notice of such award shall be published for three days," etc. Publication for two days only does not satisfy the statute.

APPEAL from Nineteenth Judicial District, San Francisco County.

W. C. Burnett for respondent; Parker & Roche for appellant.

CROCKETT, J.—The action is to collect a street assessment, and the defenses set up in the answer are, first, that the publication in the "Chronicle" of the resolution of the intention of the board to cause the work to be done was insufficient; second, that the notice of the award of the contract was published for only two days, instead of three, as required by the statute. A demurrer to the answer having been sustained and a final judgment entered for the plaintiffs, the defendant appeals.

The publication in the "Chronicle" was sufficient: Richardson v. Tobin, 45 Cal. 30. But the statute does not provide who shall cause the notice of the award of the contract to be published. It only requires that "notice of such award shall be published for three days (Sundays and nonjudicial days excepted)," but does not indicate whether this duty is to devolve on the board of supervisors or the superintendent of streets.

In Donnelly v. Tillman [47 Cal. 40] and Donnelly v. Marks [47 Cal. 187], decided at the October term, 1873, we held it to be incumbent on the board of supervisors to publish the notice of the award, and in Hewes v. Reis, 40 Cal. 264, we decided that for omissions by the board to pursue the statute,

the remedy was not by remonstrance or petition to the board itself. We further held that an omission to publish in the manner required by law and for the requisite period a notice inviting sealed proposals for the work was fatal to the assessment. In this case the omission, as averred by the answer, was to publish the notice of the award for the requisite period. On the reasoning in Hewes v. Reis, we think this omission invalidated the assessment.

Judgment reversed and cause remanded, with an order to the court below to overrule the demurrer to the answer. Remittitur forthwith.

We concur: Rhodes, J.; McKinstry, J.; Niles, J.

The following was filed September 9, 1874:

By the COURT.—It is ordered that the judgment entered in this case at the present term be vacated and set aside; and it appearing to the satisfaction of the court that the appeal was not taken in good faith, and that the appellant desires to have the judgment of the court below affirmed, we decline to express any opinion on the questions of law involved in the appeal, and the judgment is affirmed.

Remittitur forthwith.

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JOHN FORSTER, Respondent, v. PIO PICO, Appellant.

Nos. 3922 and 3953; August 5, 1874.

**Appeal—Review of Finding of Jury.**—When on a particular point in a case the question of fact has been submitted to a jury, and the latter's finding thereupon is deemed, on appeal, as sufficiently supported by the evidence, such finding will not be disturbed.

**Appeal—Review of Finding on Conflicting Testimony.**—A finding by the trial court upon evidence substantially conflicting will not be disturbed on appeal.

**Quieting Title—Appeal.—Findings of the Trial Court,** discrediting pretenses advanced to defend the occupancy of land, are not to be disturbed when justified by the evidence.

APPEAL from Eighteenth Judicial District, San Diego County.

F. Ganahl, V. E. Howard, W. Jeff. Gatewood and J. Hartman for respondent; A. Branson and C. P. Taggart for appellant.

WALLACE, C. J.—These appeals are taken in the same original action which was commenced by the plaintiff against all the defendants to obtain a decree quieting his title to the premises in controversy.

The premises were granted in 1841 by Governor Alvarado to Andres and Pio Pico, and were finally confirmed to them by the authorities of the United States in 1866.

In 1862 Andres conveyed his interest to Pio, and the latter in 1864 executed and delivered to the plaintiff a deed of conveyance, purporting to convey to him the entire premises.

The defense set up by the defendant Pio Pico in this action is, that the interest which was conveyed by Andres to him in 1862 was, in fact, held by him only in trust for the grantor, and that the deed made by him to the plaintiff in 1864 was intended to convey only the undivided one-half of the premises, which belonged to Andres, the latter having agreed with the plaintiff that such a conveyance should be made. The question of fact upon this point was submitted to a jury, who found that Pio Pico intended, at the time of the delivery of the deed, to convey the whole, and not merely the one-half, of the premises to the plaintiff, and was not induced to make the deed by any fraudulent representations by or on behalf of the plaintiff, etc. The evidence fully supports this finding.

Numerous exceptions to the action of the court at the trial appear in the record, but upon considering them, we think that there is no error shown which would justify a reversal of the judgment against Pio Pico rendered below.

The other defendants who have taken the appeal in case No. 3922 are the widow and children of Jose Antonio Pico, deceased, and in the court below they set up the defense that Jose Antonio (a brother of Andres and Pio Pico) was in fact the owner of an undivided one-fourth of the premises sued for, and that they became seised thereof at his death in the year 1871. In support of this claim upon their part they

relied at the trial principally upon a declaration averred to have been made in writing by the defendant Pio Pico in the year 1845, to the effect that the premises belonged in equal shares to Andres, Pio, and Jose Antonio Pico and Dona Maria Ygnacia Alvarado (wife of Pio Pico); but the court found the fact to be that this alleged declaration in writing was never made by Pio Pico, and the evidence being substantially conflicting upon that point, the finding will not be disturbed here. The court below found, too, that the pretenses set up by the defendants (who are the widow and children of Jose Antonio Pico), to the effect that the latter, in his lifetime, had possessed the lands in controversy, or some portion thereof, as a part owner, or as claiming an interest for himself therein, were not true in point of fact, but that, on the contrary, he had repeatedly attempted to purchase an interest therein from Pio Pico prior to 1864, and after that year had endeavored to obtain an interest from the plaintiff (who had in the meantime received from Pio Pico the deed which formed the principal point of controversy in case No. 3953), and always without success. The evidence in the record fully justifies the finding in this respect.

We discover no error in the record which would justify a reversal of the judgment below, and it results that in each of these cases the judgment and order denying a new trial must be affirmed.

And it is so ordered, the remittitur to issue forthwith.

We concur: Crockett, J.; Niles, J.; Rhodes, J.

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FRANCISCO HURTADO and MARIE DOLORES HURTADO, Respondents, v. JAMES McM. SHAFTER, Appellant.

No. 4310; August 10, 1874.

**Mistake.—A Complaint Claiming Relief on the Ground of mistake** must aver not only the fact of the mistake, but also the circumstances under which the mistake occurred, so far as necessary to bring the case within the rules for giving equitable relief.

APPEAL from Third Judicial District, San Francisco County.

J. N. Sharpstein and H. H. Haight for respondents; J. McM. Shafter in pro. per.

By the COURT.—The plaintiffs claimed, and in the court below obtained, relief, on the ground of a mistake occurring upon their part in attempting to effect a redemption from the sheriff's sale upon foreclosure of a mortgage.

It is well settled that a complaint claiming relief on the ground of mistake must not only distinctly aver the fact of the mistake, but also set forth the circumstances under which it occurred, so far as those circumstances may be necessary to present a case within the rule of equity upon which relief is granted. Tested by this rule, the complaint here is radically defective, and the demurrer should have been sustained.

Judgment and order denying new trial reversed and cause remanded, with directions to sustain the demurrer to the complaint.

Remittitur forthwith.

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## REANDA, Respondent, v. FULTON et al., Appellants.

No. 3807; August 25, 1874.

**Taxation—Misnomer.**—A Judgment in a Tax Suit Wherein the Plaintiff is named as "The Mayor and Common Council of San Jose," instead of "The City of San Jose," is not void because of the misnomer.

**Taxation.**—A Judgment in a Tax Suit Which Subjects the Real Estate to sale for the whole tax due instead of enforcing the lien upon each parcel, as asked in the complaint, would be susceptible to appeal for error but cannot be attacked collaterally.

**Taxation.**—A Sale by the Sheriff in Execution of a Tax Judgment must be conducted according to the directions in such judgment.

**Statute of Frauds—Part Performance.**—Under a Verbal Contract for the Sale of land, payment of the purchase money is not, of itself, a sufficient part performance to take the case out of the

statute of frauds; but there must be a showing that the purchaser's continued possession was due to or influenced by the verbal contract, or that but for it he would have abandoned the premises.

APPEAL from Twentieth Judicial District, Santa Clara County.

Moore, Laine & Leib for respondent; Houghton & Reynolds for appellants.

CROCKETT, J.—It appears from the findings that an action was commenced in the name of the "Mayor and Common Council of the City of San Jose," but on behalf of the municipal corporation of the "City of San Jose," against the defendant Fulton and certain real estate of which he was the owner, to recover delinquent taxes due to the corporation. The complaint in that action described the real estate as consisting of two separate town lots, which had been separately assessed, and the improvements on one of which were also assessed separately. There was likewise a small sum due from Fulton for a tax on personal property. The prayer was for a personal judgment against Fulton and for a several judgment against each parcel of the real estate and the improvements for the tax assessed upon each severally. Fulton and the real estate were duly served with process but made default, and a judgment was entered for the plaintiff against the personal defendant and the real estate for all taxes in solido and the costs. Under the order of sale which was issued, the sheriff offered the lots separately, but no bidder offering to take the whole of either lot for the taxes and costs, the two lots (which abutted on each other) were sold together to one Kennedy, who in due time obtained the sheriff's deed and subsequently conveyed to the plaintiff. It further appears that the real purchaser at the sale was D. M. Delmas, an attorney at law, for whom Kennedy held the legal title in trust.

During all this time Fulton was in the open, exclusive and adverse possession of the lots, claiming title thereto, and after Kennedy obtained the sheriff's deed, and whilst Fulton was so in possession, a verbal agreement was entered into between Delmas and Fulton, whereby the former agreed, in consideration of the sum of eighty-five dollars, to sell to the latter all the interest acquired under the sheriff's deed, and to procure

for him a conveyance of the interest then held by Kennedy in trust for Delmas.

The eighty-five dollars was paid and was accepted by Delmas in full satisfaction of the interest agreed to be conveyed, but instead of procuring the conveyance to Fulton, he caused Kennedy to convey the title to the plaintiff in this action, which is ejectment to recover the possession. It further appears that at the time of the sheriff's sale, and also at the time of the verbal agreement between Delmas and Fulton, the premises in controversy were, and yet are, of the value of three thousand dollars or more. A judgment was entered for the plaintiff, from which the defendant appeals.

The first point relied upon by the appellant is, that the judgment in the tax suit was void, because the action was brought in the name of the "Mayor and Common Council of the City of San Jose," instead of the "City of San Jose," the true corporate name. But we think this was a mere misnomer of the corporation which did not invalidate the judgment. The action was in the name of the chief executive and legislative departments of the city government, on behalf of the corporation, to recover taxes due to it in its corporate capacity. It was sufficiently plain on the face of the proceedings that the action was for the benefit of the corporation, and there was only a misnomer in an unimportant particular. Moreover, section 73 of the charter (Stats. 1865–66, p. 268) authorizes actions for certain purposes to be brought in the names of the mayor and common council, and if the court permitted them to prosecute to final judgment an action for a different purpose, it was an error which might have been corrected on appeal; but as the court had jurisdiction of the parties and of the subject matter, the judgment was not void. Nor is it void because it does not accord with the complaint, in that it subjects the real estate to sale for the whole tax due instead of enforcing the lien upon each parcel for the tax assessed upon that parcel. This error was a proper subject for appeal, but does not expose the judgment to attack in a collateral action: Reeve v. Kennedy, 43 Cal. 643; Jones v. Gillis, 45 Cal. 541; Stokes v. Geddes, 46 Cal. 17; Mayo v. Foley, 40 Cal. 281.

The point that the sheriff's sale was void because he sold both lots together instead of each separately for the tax as-

sessed upon it is not tenable. The judgment did not direct them to be so sold, and he could not go behind the judgment: Mayo v. Foley, supra. Moreover, his return shows that he offered them separately without success, and was forced to sell them both as he did, in order to raise the total amount due.

This brings us to consider the equitable defense, founded on the verbal contract of sale, followed by the payment of the purchase money. Under a verbal contract for the sale of land, it is well settled that the payment of the purchase money is not of itself a sufficient part performance to take the case out of the statute of frauds. But if the possession be also delivered to the purchaser under the contract, and particularly if he expends his money in improving the property, on the faith of the purchase, this will be a sufficient answer to a plea of the statute. But the defendant does not come within the latter category.

It does not appear that he made any improvements after the verbal contract of purchase; and it is admitted that he was already in possession at the date of the contract and had been for a long time prior thereto, under a claim of title.

It is clear he did not acquire the possession from or through Delmas, nor under or by means of the verbal contract. But already having the possession, he continued to hold it just as he had done before. His relation to the property was in no respect changed, except that he had paid Delmas eighty-five dollars, upon a verbal promise of the latter that he would procure for him a conveyance of the title held by Kennedy under the sheriff's deed.

We understand the rule to be that in order to constitute an element in part performance, the possession of the purchaser must be referable to the contract of purchase. "To make the acts of part performance effective to take the agreement out of the statute of frauds, they must be such as cannot be referred to any other title than such an agreement as that alleged, nor have been done with any other view or design than to perform such an agreement; therefore, where a tenant in possession sued for the specific performance of an alleged agreement for a lease, and set up the possession as an act of part performance of the agreement, it was held not to be such, because it was referable to his character as tenant": Fry on Specific Performance, sec. 387, and note.

We think, however, this is a somewhat broad statement of the correct rule. That there are cases in which a purchaser in possession at the date of the contract may set up his continued possession after the contract as an act of part performance, we have no doubt. If, for example, a person be in possession as a mere intruder, without color or claim of title, and when about to abandon the possession enters into a verbal contract of purchase from the true owner, pays the purchase money, and is authorized by the vendor to continue, and does continue, in possession, under the contract, and not otherwise, we think this would be a sufficient part performance. His possession after the contract would be wholly referable to it—as much so as though he had first abandoned the possession and again entered under his purchase. "A mere continued possession by the plaintiff, he having been in possession before the contract, is not enough, unless there be declarations or circumstances distinctly showing that the continuity of possession is in pursuance and execution of the contract, and so by order of the parties"; 3 Parsons on Contracts, 393. This we consider to be the true rule; and it is unfortunate for the defendant in a case of such apparent hardship as this that there is nothing in the record to bring his case within the rule. There is nothing to show that his continued possession after the contract was in any degree due to or influenced by the verbal agreement, nor anything to indicate that he would have abandoned the possession except for the agreement. There is an entire absence of proof of any "declarations or circumstances distinctly showing that the continuity of possession was in pursuance and execution of the contract, and so by order of the parties." It is true one of the incidents of the contract resulting by operation of law was that, as against Delmas, the defendant, without any other agreement than that contained in the contract, would have been entitled to continue in possession; and in this sense, it might be said that the continued possession was in some degree referable to the contract. But the rule of law requires something more, and that it shall be made distinctly to appear that except for the verbal contract of sale, the possession of the vendee would have ceased, or at least that the continued possession was held solely under and in virtue of the contract, and with no other "view or design than to perform

such agreement." If this be not the rule, a payment of the purchase money would of itself be a sufficient part performance by a vendee in possession under a verbal agreement to purchase an outstanding title, even though it should appear that at the time of the purchase he denied the title of the vendor, asserting a superior title in himself, and declaring that he was only purchasing his peace by quieting a vexatious and groundless claim. In such a case there would be no pretense that the continued possession was referable to the verbal agreement, or was in any degree attributable to it. It would be a contradiction in terms to say that such a possession was in "part performance" of the verbal contract.

On the contrary, it would be a possession wholly independent of and having no reference whatever to the agreement. It is clear that in such a case the payment of the purchase money would be the only act of part performance; and this has been uniformly held to be insufficient to take the case out of the statute of frauds. In principle, the case at bar cannot be distinguished from the case supposed.

The defendant was already in possession under an adverse claim of title, and whilst so asserting his title purchased from Delmas for an inconsiderable sum, greatly disproportioned to the value of the property, an outstanding claim, paid the purchase price, and continued in possession as before; there being nothing to indicate that the possession was continued in part performance of the agreement or was in any degree attributable to it.

We think there was not a sufficient part performance to take the case out of the statute of frauds, and that the judgment should be affirmed.

So ordered.

We concur: Wallace, C. J.; Niles, J.

F. M. SLAUGHTER, Respondent, v. F. M. FOWLER and E. H. GATES, Appellants.

No. 3797; October 2, 1874.

**Ejectment—Sufficiency of Complaint.—In Ejectment It is not Sufficient** for the complaint to aver possession by the plaintiff on a certain day, naming the day, and allege ouster as of that day, without further averment of title, seisin or right to the possession; the complaint must show that the plaintiff was entitled to the possession when bringing the suit.

**Public Land—Person in Possession may Convey His Interest.—** A person in possession of public land may freely make a conveyance of his possession or right, so far as it goes, and the conveyance is as valid as would be one in fee simple; it is sufficient to transfer to his grantee the right of possession as against anyone not connecting himself with the title of the United States.

Glassell, Chapman & Smith for respondent; A. Brunson and F. Stanford for appellants.

See Slaughter v. Fowler, 44 Cal. 195.

RHODES, J.—This is an action of ejectment. The complaint alleges that on the first day of March, 1871 (the day of the alleged ouster), the plaintiff was "possessed and entitled to the possession" of the tract of land thereinafter described. It contains no other or further averment of title, seisin, or right to the possession; nor does it allege that the plaintiff was entitled to the possession at the commencement of the action. It is clear that a plaintiff cannot recover the possession unless he was entitled to it at the commencement of the action. The averment that he was entitled to the possession is not an averment, even by inference, that he is now entitled to the possession. No objection was taken to the complaint by demurrer, or in any other mode, in the court below on either trial or on the former appeal, and the matter is alluded to here simply for the purpose of repelling any presumption that might be raised from our silence that we regard the allegation as sufficient.

The plaintiff attempted to deraign title from Yorba, and for this purpose introduced a deed to himself from Yorba,

executed after the defendant's grantors had entered into the possession. He showed no paper title in Yorba, and, of course, the deed would convey nothing as against the defendants, unless he proved that Yorba had the prior possession. We have carefully examined bill of exceptions No. 3—the one which contains the specifications of the insufficiency of the evidence to sustain the verdict—and find no evidence therein which makes out prior possession in Yorba. The plaintiff testified that Yorba stated that he claimed the land both under certain school land warrants and "by his long possession of the premises"—that if his warrants were not good, "his long possession of the place was good." He also testified that he had seen Yorba's horses grazing on the land from 1854 up to October, 1868. We are of the opinion that this falls short of making out a case of prior possession.

It is insisted that under the pleadings the plaintiff must show that he had the possession of the premises, or fail in the action. But we are of the opinion that, under the allegation that he is entitled to the possession, he may prove any title which gave him the right of possession; and he is not limited to proof of his own prior possession.

It is insisted that the conveyance of Yorba to the plaintiff is inoperative and void, because the land is public land, and the grantors of the defendants were in the adverse possession of the lands, or some part of it, when the conveyance of Yorba to the plaintiff was made. If Yorba had the prior possession, he was entitled to convey his possession, or his right to the possession; and such conveyance is valid, and is sufficient to transfer to his grantee the right of possession, as against any person who does not connect himself with the title of the United States. When neither party connects himself with that title, it is discarded from consideration in determining the rights of the respective parties, and the right or title presumed from or having its origin in prior possession is the subject of sale and conveyance in the same manner as a title in fee simple.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinstry, J.; Niles, J.; Crockett, J.

JOHN BIGLEY, Respondent, v. EDWARD NUNAN, Appellant.

No. 3698; October 2, 1874.

**Nuisance—Obstruction of Street—Jurisdiction.**—An action for nuisance imputed to the defendant in obstructing a public street in front of his premises is not one involving title to real estate, so as to be beyond the jurisdiction of the county court.

**Dedication.—The Filing in the Recorder's Office by a Tract Owner** of a map of the tract, divided into blocks, bearing a memorandum written and signed by him requesting such filing to be made and stating the map to be a plan according to which he would make sales and conveyances, is a dedication to the public of the streets marked on the map, which dedication, on being accepted, becomes irrevocable.

**Evidence.—Possession is Prima Facie Evidence of Title,** and raises a presumption, if unexplained, that the possessor is the owner.

**Dedication—Use of Part of Street as Acceptance.**—Acceptance by the public of a street dedicated through the filing in the recorder's office of a map of a tract is sufficiently shown by the fact of a public user of one side of the street bed, although the other side is obstructed by sand so as to render it impossible for travel.

**Nuisance.—A Private Person cannot Recover Damages Resulting** from a public nuisance suffered by him in common with the public, yet if he sustain a peculiar injury which is a special damage to him, in addition to the damage to the public, an action will lie.

APPEAL from Fourth Judicial District, San Francisco County.

Hutton & O'Neil for respondent; George & Loughborough for appellant.

See Bigley v. Nunan, 53 Cal. 403.

CROCKETT, J.—This appeal is by the defendants from a judgment of the county court in an action for nuisance caused by the obstruction of a public street in front of the plaintiff's premises.

The point that the action involved the title to real estate, and that for that reason the county court had no jurisdiction, is not well taken. The questions before the court were: 1. Whether the locus in quo was a public street; that is to say,

whether the public had an easement which entitled it to the free use of the land as a highway. If the easement existed, it is immaterial in whom the fee was. 2. If the easement was established, did the defendants obstruct the free enjoyment of it, as alleged? 3. Had the plaintiff suffered such damages as entitled him to maintain the action?

The first proposition is the only one which presents any real difficulty. The plaintiff claims to have established that on the 31st of January, 1861, the northerly half of the block, through the center of which the street runs, was the property of J. C. Beideman, and on that day he filed in the recorder's office a map of this and other adjoining blocks, on which the street in controversy was laid down and was denominated "Olive avenue." On the map was a memorandum in the handwriting of Beideman in these words:

"The county recorder of the city and county of San Francisco will please file in his office the above map or plan of the Beideman tract of land, according to which I shall hereafter make all sales and conveyances.

"(Signed) J. C. BEIDEMAN."

The obstructions complained of are fences including the northerly half of Olive avenue, which is alleged to be thirty-five feet wide, and the plaintiff claims that when Beideman filed the map he was the owner of the land on which the obstructions are placed, constituting the north half of the street. It is claimed that the filing of this map was a dedication of the land by Beideman to public use, and that the dedication was accepted by the public. If Beideman was the owner of the land when the map was filed, there can be no doubt that the dedication was complete on the filing of the map, and if the dedication was accepted by the public, it was thereafter irrevocable. On this branch of the case the points relied upon by the defense are, first, a failure of proof that Beideman was the owner; second, that there is no evidence of an acceptance by the public; third, that Beideman revoked the dedication by conveying the land to the defendants or their grantors. There is no evidence of title in Beideman other than that in January, 1861, and prior thereto, he was in possession of the strip of land constituting the north half of the street. The evidence of his possession is rather vague and unsatisfactory. Nevertheless, we cannot say there was

a total failure of evidence on that point, or that it was insufficient to support the judgment, in the absence of all countervailing evidence. Possession is of itself prima facie evidence of title, and raises a presumption, if unexplained, that the possessor is the owner. The evidence of title in Beideman was, therefore, sufficient to support the judgment.

In respect to the acceptance of the dedication by the public there was evidence tending to show that at the time of filing the map, and for some time thereafter, a large portion of the north half of the street was so obstructed by sand that teams could not pass over it, but the south half was used as a roadway through the entire block, not only by the persons whose premises extended to the street on the south side, but also by the public. We think this was a sufficient user to constitute an acceptance of the dedication. If a portion of one side of a street dedicated to public use be so obstructed by natural causes as to render it inaccessible for ordinary travel, the use of the remainder by the public is an acceptance of the whole.

The proof shows that the street was used by the public as far as it was capable of use in its then condition, and to constitute an acceptance it is not essential that the user should extend to every square yard of a street dedicated to public use. The dedication having been accepted, Beideman had no power thereafter to revoke it. This view of the case renders it unnecessary to consider the question of dedication by the city.

But it is contended the plaintiff suffered no such special damage from the obstruction as will enable him to maintain the action. Section 249 of the Practice Act then in force defines as a nuisance anything that is "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Whilst it is true that a private person cannot recover damages resulting from a public nuisance which he suffers in common with the public, yet, if he sustains a peculiar injury which is a special damage to him, in addition to the general damage to the public, an action will lie: Aram v. Schallenberger, 41 Cal. 449.

It appears in this case that the plaintiff's property fronting on the street was greatly depreciated in value in con-

sequence of the obstruction. This a special damage which entitled him to maintain the action.

Judgment and order affirmed.

We concur: Wallace, C. J.; Rhodes, J.; Niles, J.; McKinstry, J.

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JOHN BIGLEY, Respondent, v. EDWARD NUNAN, Appellant.

No. 3691; October 3, 1876.

**Public Streets—Olive Avenue in San Francisco—Act of Congress of 1866.**—A reservation of land for public use, made by city ordinance, is within the act of Congress of 1866, relinquishing the title of the United States to land in the western addition of San Francisco, "except such portions thereof as may be reserved and set apart by ordinance of said city for public use," although the reservation was made before the passage of such act; and if a street so reserved, such as Olive avenue, is definitely outlined and located on the map, it is not material that it is not designated by name.

**Public Street—Obstruction—Action by Individual.**—If the obstruction of a public street renders access to a lot less convenient than it otherwise would be, the owner of the lot can maintain an action to abate the nuisance and recover special damages.

**Public Street—Obstruction—Remedy of Individual.**—Where the obstruction of a public street furnishes a continually recurring cause of action to a lot owner, a court of law cannot afford him adequate relief. Injunction is his remedy.

APPEAL from Fourth Judicial District, San Francisco County.

Hutton & O'Neil for respondent; George & Loughborough for appellant.

CROCKETT, J.—The action is to abate a public nuisance and for the recovery of special damages alleged to have been suffered by the plaintiff. The nuisance complained of is the obstruction of the north half of Olive avenue, which is alleged to be a public street in the city of San Francisco, located in the western addition and within the territory, the title to which

was relinquished by the United States to the city by the act of Congress of March 8, 1866 (14 Stats. at Large, 4). The title was conveyed to the city in trust "that all the said land not heretofore granted to said city shall be disposed of and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the state of California may prescribe, except such portions thereof as may be reserved and set apart by ordinance of said city for public use." By the act of March 14, 1870 (Stats. 1869–70, p. 353), the legislature prescribed the method and the terms and conditions on which the beneficiaries might avail themselves of the act of Congress and secure the title. The defendants claim that in accordance with these provisions they have acquired the title to that portion of Olive avenue (so called) which is alleged to have been obstructed, and that it has never been dedicated to public use as a street. But, as we have seen, the act of Congress excepts from the grant to the persons in possession such portions of the land "as may be reserved and set apart by ordinance of said city for public use." If strictly construed this phrase might, perhaps, be held to apply only to reservations for public use, to be made by ordinance passed after the passage of the act of Congress. But this interpretation would be too narrow, and a reservation for public use made by a city ordinance before the passage of the act of Congress comes fully within the spirit, if not within the precise letter, of the act. Was this land so reserved? By the act of April 26, 1862 (Stats. 1862, p. 407), the legislature established a "Board of Civil Engineers" to survey all the streets of the city "and fix the lines thereof," and to make a map showing the width of every street, and to erect monuments for the preservation of the street lines so established. On completing their work the board was required to return the maps and profiles, with a report of their proceedings, to the board of supervisors for their approval; and it is then provided that "when the same shall be finally adopted by an order of the board of supervisors, such maps and profiles shall stand as the legal and valid official plan of said city, to determine the lines of the streets and the grades thereof." The engineers, having completed their work, returned the maps and profiles to the board of

supervisors, and in January, 1866, that board, by an order duly entered, adopted and approved the survey, maps, profiles and block book, as returned, and declared that they "do stand as the legal and valid official plan of the city and county of San Francisco, to determine the lines of the streets and the grades thereof, as provided by the acts of the legislature aforesaid." On the map so approved, while "Olive avenue" is not designated by name as a street, there are parallel lines running through the blocks, which indicate unmistakably that they were intended to designate a street precisely where Olive avenue is now located. Except that it is not named on the map, it is indicated and its locality fixed, precisely as are all the other streets of the city. It is too clear to admit of debate that the space now called "Olive avenue" was represented on the map as one of the public streets of the city; and by adopting the map as the official plan "to determine the lines of the streets," the board of supervisors reserved that space for public use within the true intent and meaning of the act of Congress. Having been thus reserved and dedicated to public use, it is within the exception specified in the act, and the defendants or their grantors acquired no equities which could be perfected by a conveyance from the city under the act of March 14, 1870.

We think the proof of dedication was sufficient, and that the plaintiff suffered such special damage as entitled him to maintain the action. The fact, however, that his property was depreciated in value by the alleged nuisance is not to be included in this category: Hopkins v. Wn. Pac. R. R. Co., 50 Cal. 150. But there was evidence tending to show that by reason of the obstruction of the street the access to the plaintiff's lot was less convenient than it would otherwise have been, and that he was, to that extent, obstructed in the free use and enjoyment of his property. This was such special damage as entitled him to maintain the action: Schulte v. N. P. T. Co., 50 Cal. 592.

The authorities are to the effect that to entitle the party to an injunction in such cases, the damage must be of such a nature that an action at law would not afford adequate relief. There are many cases in which the remedy by an action at law would furnish complete redress; as, for example, if the defendant had dug a pit in a public highway, in which a

traveler had fallen, an action for damages would afford a complete remedy. But where the continuance of the nuisance, as in this case, would furnish a continually recurring cause of action, it is clear that a court of law cannot give adequate relief.

We consider it unnecessary to notice more particularly the other points discussed by counsel.

Judgment and order affirmed.

We concur: Rhodes, J.; Niles, J.

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## ISAAC HARTMAN, Respondent, v. E. P. REED, Appellant.

No. 3222; October 28, 1874.

**Adverse Possession.—An Owner of Land, After Conveying an Undivided Fraction,** may hold the latter by adverse possession against the grantee, as being included in the term "the whole world."

**Cotenancy—Adverse Possession.—Until the Contrary Appears, the Possession** of one tenant in common is deemed the possession of the other also; it is amicable to him until shown to be hostile, which showing must be, by acts and declarations of the person in possession, brought home to the other.

**Cotenancy — Adverse Possession — Pleading and Evidence.—** When the statute of limitations is relied on by a tenant in possession as against his cotenant, it must, at the trial, be proved by the party so relying that his possession was hostile and not amicable, but in pleading it is sufficient to aver an open, notorious and exclusive possession as against the whole world.

**Statutes.—When Two Legislative Acts are Plainly Repugnant,** not susceptible of being reconciled, the one of the more recent enactment prevails.

**Executors and Administrators—Presenting Judgment Claim.—** The Probate Act, requiring a judgment creditor of the decedent to present his judgment to the administrator as a claim, defeats the provision of the Civil Practice Act, whereby on leave first had from the probate court, if a debtor has died after the recovery of judgment on the debt, execution may issue against the estate.

APPEAL from Seventeenth Judicial District, San Diego County.

A. Brunson for respondent; S. O. Houghton, Glassell, Chapman & Smith for appellant.

See Hartman v. Reed, 50 Cal. 485.

CROCKETT, J.—This is an action under section 254 of the late Practice Act, to quiet the plaintiff's title to an undivided third of a tract of land in San Diego county. In his complaint he sets out the deraignment of his title from Olvera, the grantee of the Mexican government, to whom the title has been finally confirmed; and then proceeds to state the alleged title of the defendant Reed, and of the administrator of the estate of S. J. Crosby, deceased; and prays, in substance, that certain deeds, under which the defendants claim, be set aside, and that it be adjudged that the defendants have no valid title, and that they be restrained from asserting any claim to the property. The administrator of Crosby filed no answer, and judgment was taken against him by default. Reed answered, and on the hearing the court entered a judgment for the plaintiff, from which, and from the order denying his motion for a new trial, Reed appeals to this court.

Before answering, Reed had filed a general demurrer to the complaint, which was overruled; and this ruling is relied upon as error. The principal point made in support of the demurrer is founded on that portion of the complaint which alleges that in the year 1854 Olvera, under whom both parties claim, conveyed to Crosby by absolute deed one undivided third part of the rancho; and that this conveyance remains in force, never having been annulled or set aside. The complaint then avers that in the year 1869 Olvera conveyed to the plaintiff "the same identical one undivided third part" before then conveyed to Crosby, and which is now claimed by Reed under Crosby. The argument is, that the title to this undivided third being in Crosby, the subsequent deed of Olvera to the plaintiff for the same undivided third was ineffectual to pass any title whatsoever, and that the plaintiff has, therefore, stated himself out of court. But the complaint avers that from the year 1859 to the year 1869 Olvera was in the open, continued, notorious and exclusive occupation and possession of said premises, "holding the same adversely to all

the world." If this be true, as it must be assumed to be for the purposes of the demurrer, he had acquired a title under the statute of limitations, which was valid as against his cotenant Crosby, and those claiming under him: Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722.

It is true that, until the contrary appears, the possession of one tenant in common is deemed to be the possession of his cotenant also. The possession is presumed to have been amicable until it is shown to have been hostile; and the fact that it has become hostile must be proved by the acts and declarations of the tenant in possession; nor will even this suffice to put the statute in motion, unless notice of the hostile acts and declarations are brought home to the cotenant out of possession: 3 How. (U. S.) 674, 11 L. Ed. 778, and cases there cited.

When the statute of limitations is relied upon by the tenant in possession, as against a cotenant, the foregoing facts must be proved at the trial, or the claim founded on the statute must fail. But, in pleading, it will be sufficient to aver an open, notorious, exclusive and adverse possession as against the whole world. The averment is broad enough to include an adverse possession as against a cotenant, without alleging also the probative facts, which establish that the possession was adverse. Only ultimate facts need be averred in a pleading, and if the tenant in possession was in the open, notorious, exclusive, adverse possession as against the whole world, his possession must necessarily have been adverse as against his cotenant. This was the ultimate fact to be averred, and the probative fact was, that the tenant out of possession had notice of the adverse holding. The averments of the complaint were, therefore, sufficient to show an adverse possession by Olvera for more than ten years, as against Crosby and those claiming under him, prior to the execution of the deed to the plaintiff. If this be so, Olvera was then the owner of the whole rancho, and his deed to the plaintiff was operative to convey the undivided interest which it purported to convey. The other points raised by the demurrer are untenable, and need not be specially noticed.

The demurrer was properly overruled.

The only title to the land in controversy which Reed claims to hold is derived through a money judgment rendered

against Crosby in his lifetime, and which remained unpaid at the time of his death; and through an execution issued on the judgment, after Crosby died, and a sheriff's sale to Reed in virtue thereof, followed in due time by the sheriff's deed. If this title is worthless Reed has no title to the land either legal or equitable; and if the execution under which he claims was void, it is clear the sheriff's deed is void also. The execution was issued in the year 1861 out of the district court, after permission to that effect had first been obtained from the probate court, in accordance with section 215 of the Probate Act, as it then stood. This section, as it was then in force, was in these words: "Notwithstanding the death of a party after the judgment execution thereon against his property may, upon permission granted by the probate court be issued and executed in the same manner and with the same effect as if he were still living."

The Civil Practice Act, of which this section was a portion, was passed April 29, 1851. Two days thereafter, to wit, on May 1, 1851, the legislature passed the act to regulate the settlement of the estates of deceased persons, section 141 of which is in these words: "When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death; but it shall be presented to the executor or administrator as any other claim; but it need not be supported by the affidavit of the claimant; and if justly due and unsatisfied, shall be paid in due course of administration; provided, however, that if the execution shall have been levied upon any property of the deceased, the same may be sold for the satisfaction thereof; and the officer making the sale shall account to the executor or administrator for any surplus in his hands."

Section 215 of the Probate Act, as we have seen, authorized an execution to issue on a money judgment, rendered in the lifetime of the deceased, even though no previous execution had issued or been levied, provided the permission of the probate court was first obtained. But section 141 of the Probate Act explicitly forbids an execution to issue in such a case: Cowell v. Buckelew, 14 Cal. 640. These two provisions are plainly repugnant, and cannot be reconciled; and in such cases the rule is uniform, that the last is deemed to repeal the first, on the ground that, being the latest expression of

the legislative will, it raises a presumption that, in enacting it, the legislature intended to repeal the prior statute to which it is so repugnant that the two cannot stand together.

This is a familiar rule of law. It results that the probate court had no jurisdiction to enter an order authorizing an execution to issue on the judgment against Crosby, and the order was, therefore, void. The execution was also void, because the statute expressly forbids an execution to issue in such a case. This property had not been levied upon under the judgment, during the lifetime of the judgment debtor; and under section 141 of the Probate Act, as we have seen, it could not be seized in execution after his death. The execution being void, the sheriff's deed founded upon it was also void, and Reed acquired no title to the property.

Reed having shown no title, legal or equitable, to the premises in controversy, and the administrator of Crosby not having appealed, it will be our duty to affirm the judgment, provided the claim asserted by Reed was of such a character as to create a cloud upon the plaintiff's title. In the case of Cohen v. Sharpe, 44 Cal. 30, we had occasion to consider with considerable care in what class of cases an adverse claim will amount to a cloud upon the title, and our conclusion was, that when the adverse claim bears upon its face conclusive proof of its own infirmity, so that no evidence aliunde will be needed to refute it, it creates no cloud, and a court of equity will not interfere, for the reason that the plaintiff needs no relief. The court will not do a vain thing, and attempt by a solemn judgment to remove a cloud, when none exists. The authorities on this point are fully collated and examined in the case last referred to.

In this case it is quite clear that both the order of the probate court permitting the execution to issue, and the order of the district court directing it to be issued, were absolutely void on their face, for want of jurisdiction to enter them. Being nullities, they formed no part of the record in the action against S. J. Crosby, and did not impart constructive notice of Crosby's death, or of any fact recited in them. Reed's title rested on the judgment, execution and sheriff's deed, and these, being regular on their face, prima facie conveyed to him whatever title Crosby had at the date of the levy; and as Crosby's title came through regular conveyances

from the grantee of the Mexican government, it was apparently valid. It required evidence aliunde to show that Reed did not succeed to Crosby's title, and that the execution was void, because it was issued after Crosby's death. The case, therefore, fairly comes fully within the rule; and Reed's adverse claim constituted a cloud upon the title, which the plaintiff was entitled to have removed.

This view of the case renders it unnecessary to examine the other questions discussed by counsel.

Judgment and order affirmed.

We concur: Rhodes, J.; Niles, J.

Wallace, C. J., being disqualified, did not sit in this cause.

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MORRISON BRYANT, Respondent, v. M. M. FEDER, Appellant.

No. 4472; November 7, 1874.

**Bills and Notes.—An Indorser Waives Demand and Notice if,** immediately before the maturity of the note, he tells the payee to give himself no uneasiness in regard to payment, since he is collecting money for the maker and will see that the note is paid when due.

APPEAL from Tenth Judicial District, Colusa County.

S. P. Kirk for respondent; W. F. Goad and W. C. Belcher for appellant.

CROCKETT, J.—The action is against the defendant as the indorser of a promissory note made November 15, 1871, and payable twelve months after date. As the law then stood, three days of grace were allowed, and the note became due on the 18th of November, 1872, but was not presented on that day to the maker for payment, and no sufficient excuse is shown for the failure to present it, unless the facts found by the court constitute a waiver by the defendant of demand and notice. But the court finds that immediately before the

maturity of the note the defendant told the plaintiff "to give himself no uneasiness in regard to the payment of the note—that it would be paid at maturity; that he was collecting moneys for defendant Wilcox (the maker of the note), and that he, Feder, would see that the note was paid." This promise amounted to a waiver of demand and notice. The question was very fully discussed and the authorities collected in Bruce v. Lytle, 13 Barb. (N. Y.) 163; and the court held correctly, as we think, that such a promise made before the maturity of the note is a waiver of demand and notice. This finding is attacked on the ground that it was not justified by the evidence, but there was a substantial conflict in the evidence, and we cannot disturb the judgment on this ground.

Order and judgment affirmed. Remittitur forthwith.

We concur: Wallace, C. J.; McKinstry, J.

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## FRANCISCO AURRECOCHEA et al., Respondents, v. PETER HINCKLEY, Appellant.

No. 3981; November 12, 1874.

**Adverse Possession—Mexican Claim.**—A person in continuous adverse possession of premises for more than five years may not be made to relinquish them to one asserting rights through an old Mexican claim who has no patent and no final confirmation of title.

**Adverse Possession—Mexican Claim.**—When a plaintiff relies for recovery upon a final confirmation of title, the statute of limitations begins to run only at the issuance of the patent, and so bare possession for any time antecedent would not benefit his adversary; but, without actual issue of patent, a Mexican claim which such issue might make into a practical right, cannot be recognized as a claim entitled to protection by the United States.

APPEAL from Third Judicial District, Alameda County.

E. J. Pringle for respondents; A. H. Griffith for appellant.

McKINSTRY, J.—The Mexican claim under which plaintiffs deraign title was not finally confirmed when the act of

April 18, 1863, took effect (Stats. 1863, p. 325), nor had a patent for the land been issued when this action was brought. The defendant was in the adverse possession more than five years before the commencement of the action. If the statute of 1863 is not in conflict with the constitution of the United States, or with a treaty, the defendant was entitled to judgment. No argument is made in the briefs upon the subject of such conflict.

Judgment and order reversed and cause remanded.

We concur: Crockett, J.; Niles, J.

WALLACE, J., Concurring.—I concur in the opinion and in the judgment. To prevent possible misunderstanding, however, it is perhaps material to observe that the plaintiffs here have no patent, nor any determination of the survey under the act of Congress of June 14, 1860. They have, therefore, no final confirmation of title: Johnson v. Van Dyke, 20 Cal. 225; Davis v. Davis, 26 Cal. 46, 85 Am. Dec. 157; Beach v. Gabriel, 29 Cal. 580; Mahoney v. Vanwinkle, 33 Cal. 448.

The possession of the defendant, though held under Wilkinson and Pacheco, was nevertheless adverse as to the title of the plaintiffs: McManus v. O'Sullivan [48 Cal. 7], January term, 1874, and cases there cited.

At the commencement of the action the defendant had been in the continuous adverse possession of the premises for more than five years, and the action was, therefore, barred by the sixth section of the act of 1855, as amended by the first section of the act of April 18, 1863 (p. 326), unless the right to bring the action was saved to the plaintiffs under the doctrine of the case of Gardiner v. Miller, 47 Cal. 570, and the authorities and principles of law there referred to.

It is settled by the case of Gardiner v. Miller, supra, that where a plaintiff in an action relies for recovery upon a final confirmation—that is (since the repeal of the act of June 14, 1860), a patent—the limitation prescribed by the statute of April 18, 1863, would commence to run only at the time of the issuance of the patent, and that the possession of the defendant for any period of time antecedent to its issuance would not operate to bar the action. The patent in such case, while it establishes the validity of the original claim upon

which it was issued, also protects the holders of the claim from the operation of the statute of limitations while proceedings to obtain the patent were pending in the tribunals of the federal government. Unless the patent have actually issued, however, no such protection against the operation of the statute of limitations enacted by the state can be afforded to the claimant, for until its issuance the claim itself cannot be recognized as one entitled to protection at the hands of the federal government, or brought within the obligations assumed by the government by the treaty of cession. It may be a claim utterly worthless in its character, and one the validity of which the government at the latest moment may refuse to recognize. It is not, therefore, the mere fact that the claimant is at the time actually seeking confirmation at the hands of the government which renders the statute of limitations inapplicable pending such proceedings, but the fact that he has been successful and has obtained the final confirmation he sought. Otherwise it is obvious that any claim, even the most worthless in character, may be asserted in an action of ejectment, so long as proceedings to obtain its recognition at the hands of the government, even though uniformly unsuccessful, can be kept on foot. We accordingly said in Gardiner v. Miller, supra: "It may be conceded that as against the right to commence an action upon an unconfirmed grant it was competent to set the statute of 1863 in motion from the time of its enactment," etc.

As observed already, the claim of the plaintiffs here is of that character, and in its present condition the statute of limitations, therefore, constitutes a bar to the action.

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MARION J. McDONALD, Respondent, v. CHARLES G. NOYES, Appellant.

No. 3925; November 13, 1874.

**Sale—Mutual Mistake—Estoppel.**—Under the law of sales the effect of a mutual mistake as to either terms or subject matter is that neither party is bound; if, though the contract by its terms admits of two constructions and one party proceeds with it, not correcting the other, whom he knows labors innocently under the wrong

impression of it, he is bound by the contract as the other party conceived it to be.

**Statute of Frauds.**—A Memorandum of a Contract Made by the Secretary of a board of directors is a sufficient memorandum in writing to satisfy the statute of frauds.

APPEAL from Twelfth Judicial District, San Francisco County.

Lake & Williams for respondent; Pixley & Harrison for appellant.

CROCKETT, J.—The grounds chiefly relied upon by the defendant for a reversal of the judgment are, first, that the minds of the parties never met in the purchase and sale of the stock; that the plaintiff supposed he was purchasing one kind of stock, while the defendant was in fact selling a different stock; that there was a mutual mistake as to the subject matter of the sale, and consequently no valid contract; second, that the contract was void under the statute of frauds, for want of a sufficient note or memorandum in writing; third, that the verdict was contrary to the instructions, and ought to have been set aside on that ground; fourth, that the court erred in certain rulings as to the admissibility of evidence; fifth, that a new trial ought to have been granted on the ground of newly discovered evidence.

On the first point, the general rule is that if the contracting parties were under a mutual mistake as to the subject matter or terms of the contract, so that their minds never met, neither party is bound. This is familiar law. But if the contract by its terms will admit of two or more constructions, and if one of the parties at the time of contracting knows or has just grounds to believe that the other understands it in a particular sense, and nevertheless proceeds to contract without further explanation, he will be deemed in law to have contracted in the sense in which the other understood it. In his work on Contracts Mr. Chitty quotes with approval the following observation of Dr. Paley: "Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time that the promisee received it." In summing up the rule on this point, Chitty states it as follows: "The language used by a party to

a contract must be construed as he supposed the other party would understand it, or as the other party had a right to understand it": Chitty on Contracts, 74, note. See, also, page 73.

The rule is founded on the most obvious principles of justice and fair dealing. It was on this theory that the present case was submitted to the jury, under the instructions of the court. It was for the jury to determine from the evidence whether the plaintiff at the time of the contract was authorized to believe, and did believe, that the stock offered for sale was that of the Excelsior Mill and Mining Company, and whether the defendant at the time supposed that the plaintiff would so understand it and would have the right so to understand it. The jury found these facts against the defendant, and as we think, upon sufficient evidence.

On the second point there was no error. The memorandum of the contract made by the secretary of the board was a sufficient memorandum in writing, within the statute of frauds: Merritt v. Clason, 14 Johns. (N. Y.) 484; S. C., 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; Frost v. Hill, 3 Wend. (N. Y.) 386; Davil v. Shields, 26 Wend. (N. Y.) 341; Dykers v. Townsend, 24 N. Y. 57.

The third point is not tenable. We think the verdict was not contrary to the instructions. Nor do we discover any error in the rejection or admission of evidence, or in denying the motion for a new trial.

The showing in support of the motion on the ground of newly discovered evidence was insufficient.

Order and judgment affirmed. Remittitur forthwith.

We concur: Wallace, C. J.; Niles, J.; McKinstry, J.

## WATERLOO TURNPIKE ROAD CO., Respondent, v. J. H. COLE, Appellant.

No. 3842; December 11, 1874.

**Turnpike Company—Toll-gates.—The Fixing by the Board of Supervisors** of the number of the toll-gates, and of where they were to be located, was a condition precedent to the right of the Waterloo Turnpike Road Company to collect tolls, under an act which in incorporating that company provided, in part, "such gates and tolls to be fixed and prescribed by such board of supervisors, as aforesaid, from year to year."

APPEAL from Fifth Judicial District, San Joaquin County.

J. B. Hall and W. L. Dudley for respondent; J. H. Budd for appellant.

See Waterloo Turnpike R. Co. v. Cole, 51 Cal. 381.

CROCKETT, J.—The plaintiff is a turnpike road company organized under the act of May 12, 1853 (p. 169), as amended by the act of April 27, 1857 (p. 280), and the action is to recover tolls for the use of its road. One of the defenses is that the board of supervisors of the county in which the road is located has never "fixed and prescribed" the place at which any toll-gate on said road shall be erected, nor by any valid order of the board has authorized a toll-gate to be erected; and it is contended, first, that tolls can be collected only at gates erected at places "fixed and prescribed" by the board; and second, that by erecting a toll-gate at a place not so fixed and prescribed the company has forfeited its corporate rights. It appeared in evidence that the board of supervisors fixed the rates of toll, and by an order entered in its minutes authorized the company "to establish toll-gates at such places as the directors of the road may designate on the line of said road." But before this order was entered, the company had erected a toll-gate near the western end of the road, and has ever since maintained it, being the only toll-gate on the road.

Section 18 of the act of 1853, as amended in 1857, under which the plaintiff was organized as a corporation, provides

that the corporation "shall only be allowed to put up and keep such toll-gates, demand, collect and receive such tolls, as may be fixed and prescribed by the board of supervisors of the county or counties through which such road or roads may pass. Such gates and tolls to be fixed and prescribed by such board of supervisors, as aforesaid, from year to year. And if any company or companies shall violate the provisions of this act, by putting up any toll-gate or gates, or by collecting any toll or tolls, except as may be fixed and prescribed by such board of supervisors, as aforesaid, such company or companies shall forfeit all their corporate rights in such road or roads, . . . . to the counties in which the same may be situated."

It then provides that the company may be prosecuted for such violations of the statute before a justice of the peace in any township through which the road passes.

It was manifestly the intention of the legislature to confer upon the supervisors the exclusive authority to determine the number and location of the toll-gates. If this was left to the company, as it was before the amendment of 1857, the greatest abuses might be practiced by the erection of numerous toll-gates and at the most inconvenient points on the road. It is clear, I think, that no tolls could be collected until the number and location of the toll-gates were "fixed and prescribed by the board of supervisors." This was a condition precedent to the right to collect tolls at all, and if the board refused or failed to perform this duty, it could have been compelled to do it by a writ of mandate, Nor could the supervisors delegate their authority in this respect to the directors of the company. It was a duty which involved the exercise of judgment and discretion, and, as such, could not be delegated. Before the amendment of 1857 the directors had the power to determine the number and location of the toll-gates, and to permit this power to be now conferred upon them by the supervisors would practically abrogate the amendment and restore the old law.

Order and judgment reversed and cause remanded for a new trial.

We concur: McKinstry, J.; Wallace, C. J.

PACIFIC MUTUAL LIFE INSURANCE COMPANY, Respondent, v. B. N. BUGBEY, Appellant.

No. 4341; December 15, 1874.

**Process—Loss of Original Summons.**—If a summons has in fact been served, jurisdiction of the person of the defendant has been secured even though the original is lost after service.

**Process—Loss of Original Summons.**—If, after the service of a summons, the original has been lost, it is competent to show the contents of the summons by secondary evidence.

**A Summons Directed to a Man, Naming Him, and to His Wife,** she being identified in it by her given name only and the words "his wife" following, is a good summons, though the complaint in the action does not aver that the woman thus named is the wife of the man; and service of it upon the woman secures jurisdiction of her person.

APPEAL from Eleventh Judicial District, El Dorado County.

R. C. Clark for respondent; G. J. Carpenter and Geo. E. Williams for appellant.

NILES, J.—The court acquired jurisdiction of the person of the defendant, Martinette Bugbey. It sufficiently appears that the summons was issued and served upon her, and the return of the sheriff duly indorsed upon the original writ, which was afterward lost, and did not reach the files of the court. Jurisdiction of the person of a defendant is acquired by the service of summons. The original having been lost, it was competent to show its contents by secondary evidence: Matter of Will of Warfield, 22 Cal. 64, 83 Am. Dec. 49.

The summons was directed to B. N. Bugbee, Martinette, his wife, and Ann Johns. It is not directly averred in the complaint that Martinette Bugbey was the wife of B. N. Bugbee; and it is now objected that no jurisdiction was acquired of the person of the appellant, because the summons does not appear to have been directed to her. We do not think the point well taken.

It is apparent from the wording of the summons that Martinette Bugbee was the name of the person to whom it was

directed. The summons was actually served upon the appellant, and she was called upon to defend whatever claim adverse to the plaintiff she may have had in the premises.

Judgment affirmed.

We concur: Wallace, C. J.; Crockett, J.; McKinstry, J.

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T. MAHON, Respondent, v. JOHN SIMMS, Appellant.

No. 3665; December 23, 1874.

**Ejectment—Land Used as Turnpike.**—Ejectment is maintainable for only corporeal hereditaments, and when the subject matter is land used as a turnpike, rather than the right of way, and there has been no dedication by the plaintiff or persons he has succeeded as title holder, it is the proper remedy.

**Appeal—Review of Evidence.—On Appeal from an Order Denying** a motion for a new trial the point of insufficiency of the evidence to support the judgment will not be considered if not specified first in the statement on the motion.

APPEAL from Seventh Judicial District, Marin County.

B. S. Brooks for respondent; Sharp & Lloyd for appellant.

McKINSTRY, J.—The cases cited by appellant's counsel do not sustain his first point, that "An action of ejectment will not lie to recover the possession of a turnpike road, when the defendants only use the same for collecting tolls from the traveling public." Ejectment is maintainable only for corporeal hereditaments: Tillinghast's Adams, p. 19. But this action was not brought to recover the right of way, but the possession of the lands, the plaintiff having shown the fee in himself by virtue of the patents introduced in evidence. The exclusion of the plaintiff from entering on the land, except on the payment of a toll, and then only for the purpose of passing over the same, was a disseizin.

As the action was tried and findings filed prior to the date when the Code of Civil Procedure took effect, there is an implied finding that the defendant did not have adverse posses-

sion five years prior to the commencement of the suit. The statement on motion for new trial contains no specification that the evidence was insufficient to sustain this implied finding, and the point cannot be first made in this court.

The district court (by implication) found that the plaintiff had not dedicated the land in controversy as a public highway. We think the evidence sustains this finding.

Judgment and order affirmed and the cause remanded, with direction to the district court to amend the complaint, or cause the same to be amended (as of a date anterior to the judgment), by substituting "the San Rafael Turnpike Road" for "the San Rafael and San Quentin Turnpike Road" as a party defendant.

We concur: Wallace, C. J.; Rhodes, J.; Niles, J.; Crockett, J.

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## FRANCIS AVERY, Appellant, v. BLACK DIAMOND COAL MINING CO., Respondent.

No. 3916; December 29, 1874.

**Public Land—Patent from State.**—The law gives the state no authority to issue patents for lands to which it has not acquired title from the United States, and a patent by it issued for any such lands is void.

**School Land—When Patentable by State.**—Land selected by the state in lieu of a sixteenth section reserved from the operation of the United States law granting it school lands is patentable by it only after being first listed or certified over to it by the general government.

APPEAL from Fifteenth Judicial District, Contra Costa County.

B. S. Brooks for appellant; W. H. L. Barnes for respondent.

RHODES, J.—The plaintiff, to prove his title, introduced a patent issued by this state for the lands in controversy, which has been selected by the state in lieu of a portion of a

sixteenth section; but there was no evidence that the lands had been listed to the state by the United States. The seventh section of the act of Congress of March 3, 1853, to provide for the survey of the public lands in California and granting lands to the state for the purposes of public schools, etc., provides that lands in lieu of sixteenth and thirty-sixth sections reserved for public use, taken by private claims or preemption claims, shall be selected "agreeably to the provisions of the act of Congress approved on the twentieth of May eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for,' and shall be subject to approval by the Secretary of the Interior." Neither that act nor the act of March 3, 1853, provides for the issuing of patents for the lands so selected nor do the acts themselves "convey the fee simple title of such lands." The act of Congress of August 3, 1854, provides that "when lands have been, or shall hereafter be granted by any law of Congress to any one of the several states and territories, and when said law does not convey the fee simple title of such lands, or require patents to be issued therefor, the lists of such lands, which have been, or may hereafter be certified by the commissioner of the general land office, under the seal of said office, either as originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists, that are of the character contemplated by such act of Congress, and intended to be granted thereby."

No other mode has been provided by law for the transmission to the state of the title to the lands selected as lieu lands, and the title does not vest in the state until the lands are listed over, or certified over, to the state: Hodapp v. Sharp, 40 Cal. 69; Collins v. Bartlett, 44 Cal. 382; Buhne v. Chism [48 Cal. 467], No. 3711, July term, 1874.

The law does not authorize a patent to be issued by the state for land to which the state has not acquired the title, and a patent so issued is issued without authority of law, and is therefore void.

Judgment and order reversed and cause remanded for a new trial.

We concur: Crockett, J.; Wallace, C. J.; Niles, J.; McKinstry, J.

## METZGER & BEACH, Respondents, v. O. W. and M. W. CHILDS, Appellants.

No. 3945; December 29, 1874.

**Secret Trust for Creditors—Accounting.—An Action Against a Trustee,** under a secret trust, by the cestui que trust for an accounting is not to be dismissed as against public policy because at the time the trust was made the secret trustee was a pretended complaining creditor—there being other creditors at the time—and assumed to attach and hold the property for his individual debt; provided the real intention had by the cestui que trust and the effect of the transaction were to pay off all the creditors.

APPEAL from Seventeenth Judicial District, Los Angeles County.

The plaintiffs had owed money to the defendants, to recover which the defendants had sued them and attached some of their property, to wit, six thousand sheep. On the ground that this property was self-consuming the attaching creditors had procured an order of court to sell it; the sale had been made accordingly and one of these creditors, O. W. Childs, had become the nominal purchaser. Thereafter judgment had been rendered as demanded and execution issued, the sheriff had reported the sale and the judgment been satisfied. While this, so far, was the formal aspect of the case, the inside facts were to the effect that the sale and the holding under it, etc., were had with the consent of Metzger and Beach, which had been gained from the latter through the persuasions of the others. The property could readily have brought a higher price than that reported by the sheriff, but the purchaser was, in fact, trustee for Metzger and Beach in the matter, and was to hold the sheep, care for and manage them, and by the selling one here and there and by selling all the wool and the offspring was—or were, for O. W. represented M. W. Childs as well as himself—to raise the means for taking up and satisfying all the debts of Metzger and Beach, to whomsoever owing, after which there was to be a retransfer of the residue of the sheep to the old owners. Indeed, the more effectually to reach this aim the latter were to, and did, hand over to the others all the rest of their flock, seven hun-

dred in number, making six thousand seven hundred in all thus under the control of O. W. and M. W. Childs. The complaint in the present action went on: "And plaintiffs say that the defendants wholly refuse to render any fair and just account of their administration of said trust, but on the contrary claim large amounts against the trust fund to which they are in no wise entitled." The prayer was for an accounting, etc.

Kewen & Howard for respondents; Glassell, Chapman & Smith for appellants.

McKINSTRY, J.—The contract, so far as it authorized the purchase of the outstanding claims against the plaintiffs, was executed by the defendants. No creditor of the plaintiffs is interested in the result of this controversy, and no principle of public policy required the court below to dismiss the action.

The contract alleged was an entire contract, and proof of the fact that the defendants surrendered the possession of the sheep, which constituted their security, before a full compliance with their promise to buy up the outstanding indebtedness, was not a material variance from the terms of the contract alleged.

Judgment affirmed.

We concur: Niles, J.; Rhodes, J.

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JOHN FLANIGAN, Respondent, v. J. T. DAVIS, Appellant.

No. 3927; January 7, 1875.

**Work and Labor—Action to Recover for—Appeal.**—A finding of the court below on evidence substantially conflicting in an action to recover the value of services rendered will not be interfered with on appeal.

APPEAL from Fifth Judicial District, Stanislaus County.

A. Hewell for respondent; H. A. Gehr, F. J. Baldwin and J. H. Budd for appellant.

RHODES, J.—Action to recover the value of services rendered by the plaintiff, at the instance and request of the defendant, in feeding a threshing machine. There is no question as to the performance of the services and their value. But upon the issue as to whether the services were performed at the instance and request of the defendant or of B. J. Smith, the evidence is contradictory, and in the clearest sense conflicting. The court below gave the greater credit to the statements of the plaintiff and ordered judgment in his favor.

If the services were in fact rendered at the instance and request of the defendant, and the court found that the defendant did hire the plaintiff to perform the services, then the liability of the defendant is primary, and there is no room for the question as to whether there was a sufficient compliance with the statute of frauds to hold the defendant liable for the debt of B. J. Smith.

Judgment and order affirmed. Remittitur forthwith.

We concur: Crockett, J.; McKinstry, J.

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JAMES L. BARKER, Respondent, v. THOMAS HOPE, Appellant.

No. 4384; February 1, 1875.

**Assault and Battery—Instructions.—If a Defendant Admits That He Struck** the plaintiff with a fence pole, when he is charged with having struck him with a heavy club, the court is not unduly asserting judicial knowledge in instructing the jury that "the defendant admits that he struck the plaintiff substantially as charged."

APPEAL from First Judicial District, Santa Barbara County.

Eugene Fawcett for respondent; Charles E. Huse for appellant.

McKINSTRY, J.—We think the first instruction given by the court below is not obnoxious to the criticism to which

it is subjected in appellant's brief. The district court properly asserted judicial knowledge of the fact that a "fence pole" is a "heavy club"; and when the court said, "the defendant admits that he struck the plaintiff substantially as charged," it was a statement of an admission that he struck with a heavy club, and not of the alleged malice accompanying the blow.

Nor do we think the other points made by the appellant are well taken.

Judgment affirmed.

We concur: Crockett, J.; Rhodes, J.

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JAMES H. FARLEY, Respondent, v. JAMES GLEASON, Appellant.

No. 4446; March 11, 1875.

**Public Land—Pre-emption—Necessity of Residence.**—The pre-emption laws require a personal residence on the land; consequently a removal by the claimant to and his residing on other lands is presumptively a forfeiture of the claim.

**Public Land—Pre-emption—Excuse for Absence.**—To withhold his pre-emption claim from forfeiture because of his failure to reside actually on the land, an appellant cannot raise the question of justifiable or excusable absence when the record shows the absence to have been voluntary.

APPEAL from Third Judicial District, Alameda County.

B. B. Newman for respondent; J. M. Wood for appellant.

RHODES, J.—The premises in controversy are public lands of the United States, and were subject to pre-emption entry. The defendant, as we understand the findings, possessed the qualifications of a pre-emptor, and entered upon the lands for the purpose of securing the right of pre-emption and filed his declaratory statement, and, at the time of the commencement of this action, held the possession of the land under the claim of such right. The plaintiff's prior possession, unaccom-

panied with any other right, was not sufficient to protect him against the entry of the defendant; but, in order to render the entry and ouster by the defendant wrongful, the plaintiff must have held the possession under or by virtue of the laws of the United States. Prior to the defendant's entry the plaintiff had—or, for the purposes of the case, it may be assumed that he had—the right of pre-emption. The court found that he had rented the land and removed therefrom to a distant portion of the state, where he was residing at the time when the defendant entered. The pre-emption laws require a personal residence upon the land, and consequently a removal of the claimant to, and a residence upon, other lands is presumptively a forfeiture of the claim. But the plaintiff contends that the removal from the land and the acquiring of a residence elsewhere may have been done under such circumstances that these acts would not work a destruction of his claim—may have been compulsory, or, on some other ground, excusable. The answer to this position is that the record presents the case of a voluntary abandonment by the plaintiff of his residence on the land, and no question arises as to whether that act was justifiable or excusable.

Judgment reversed and cause remanded, with directions to enter judgment for the defendant.

We concur: Niles, J.; Crockett, J.; McKinstry, J.

I dissent: Wallace, C. J.

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GEORGE EMERSON, Admr., Appellant, v. JAMES BARRON, Respondent.

No. 4299; July 19, 1875.

**New Trial—Payment of Costs.—When an Order is Made Granting** a new trial on condition that the moving party pay the costs accrued, payment, or tender of payment, of the costs becomes a condition precedent.

**New Trial—Payment of Costs.—A Condition Imposed by the Court** in granting a new trial, that the moving party pay the costs, becomes an integral part of the order and binding on the parties, and the court has no power to dispense with the condition, since that would be substantially to dispose of the motion anew.

APPEAL from Third Judicial District, Alameda County.

A. M. Crane for appellant; J. W. Harding for respondent.

WALLACE, C. J.—In October, 1873, an order was entered in the court below granting the defendant a new trial, upon condition that he pay to the plaintiff all the costs which had theretofore accrued in the action. In February, 1874, the remittitur from this court, affirming the order, was filed in the court below, and no part of the costs having been paid or tendered, the plaintiff's attorney, on the twenty-fourth day of February, 1874, served a written notice upon the attorney of the defendant, to the effect that he would on the second day of March next thereafter apply to the court below for an order declaring the order granting a new trial inoperative, by reason of the failure of the defendant to comply with the condition therein mentioned, and that execution issue upon the judgment theretofore rendered in the cause. To this notice the defendant's attorney does not appear to have made any response, and pursuant to the notice the application was made to the court—no opposition being then made—and the motion was taken under advisement by the court, and the cause continued for the term. Subsequently, on the next day but one thereafter, the court being still in session, and the attorney for the plaintiff being present in court, the attorney for the defendant moved the court to set aside the order continuing the cause, and restore it to the term calendar, and it appearing that the continuance had been granted by reason of the absence of a witness for the plaintiff, and the defendant then proposing to consent that the evidence of the absent witness should be considered as given at the trial, the court set aside the continuance and reinstated the cause upon the calendar; but the attorney of the plaintiff declined to avail himself of the proffered consent, or to state what he expected to prove by the absent witness. It then being made to appear to the court that the defendant's attorney had only subsequently to the submission of the plaintiff's motion to disregard the order granting a new trial, to wit, on the third day of March, tendered to the plaintiff's attorney the costs required to be paid as the condition of obtaining a new trial (which costs the latter had refused to accept), the court denied the motion of plaintiff to disregard the order granting

the defendant a new trial, and subsequently rendered a judgment dismissing the action.

1. There can be no doubt that the order granting the defendant a new trial was not absolute in its terms, but was conditional only. It was so expressed upon the face of the order "conditioned upon said defendant paying to plaintiff the costs," etc. In such case the payment or tender of the costs is a condition precedent, and upon failure of the party in whose favor the order was made to perform it, or offer to do so, the order becomes inoperative: Sturdevant v. Fairman, 4 Sand. (N. Y.) 674.

2. The time within which the payment was to be made not having been fixed in the order itself, a question was argued at bar as to the proper construction of the order in that respect. There is no doubt that in such a case the required payment is to be made within a reasonable time after the entry of the order. This "reasonable time" is said in some of the authorities to be "forthwith"—that is, within twenty-four hours. It is not necessary in the view we entertain of this case, to express an opinion upon that point, for it is apparent that the offer of the defendant was not made within a reasonable time under any rule. More than four months had been permitted to elapse without an offer upon the part of the defendant to comply with the prescribed condition, and even upon notice given him that an application would be thereafter made to set aside the order by reason of his failure, he did not offer to comply, but permitted the application to the court to be made in that behalf, without opposition or excuse offered upon his part. No reason or excuse was offered below for his protracted neglect in this respect, nor has any been suggested here. The condition imposed by the court in granting the new trial became an integral part of the order and binding upon the parties, and the court below had no power in this proceeding to dispense with the performance of the condition, since that would substantially be to dispose of the motion anew.

Judgment reversed and cause remanded with directions to sustain the motion of the plaintiff for execution on the former judgment.

We concur: Rhodes, J.; Niles, J.

I dissent: Crockett, J.

WM. H. HILL, Respondent, v. WM. M. GWINN, Appellant.

No. 3790; July 28, 1875.

**Mortgage Foreclosure—Fixtures.—A Sheriff's Deed on Foreclosure Relates Back** to the delivery of the mortgage and things fixed to the mortgaged premises by the mortgagor during the interval pass with that deed.

**Appeal—Questions Raised for First Time.**—An objection that the notice of motion for a new trial and the supporting statement came too late to be available cannot be raised for the first time on appeal.

J. C. Stebbens and G. F. & W. H. Sharp for respondent; R. & N. L. Hopkins and W. K. Boucher for appellant.

See Hill v. Gwinn, 51 Cal. 47.

WALLACE, C. J.—The fixtures of the "Quaker City Mill" were removed by the defendants in May, 1870, intermediate the submission of the action of Depew v. Homer and its decision.

In July, 1870, a decree of foreclosure was entered in that case; in August following the mortgaged premises were sold by the sheriff to Murphy, the mortgagee, and in September, 1871, in default of redemption, he received a sheriff's deed. The fixtures were removed by consent of the mortgagee, but, as the court below found the fact to be, not with the consent of the mortgagors, the plaintiffs in this action. Upon these facts judgment was rendered for the plaintiffs for the value of the fixtures removed, and from this judgment and an order denying their motion for a new trial, the defendants bring this appeal.

1. The case, though differing in some of its circumstances, is not distinguishable in principle from that of Sands v. Pfeiffer, 10 Cal. 258, where the opinion was delivered by Mr. Justice Field. In that case the mortgagee, who had purchased at the mortgage sale and received a sheriff's deed, recovered the value of fixtures removed from the mortgaged premises intermediate the purchase and the delivery of the sheriff's deed. His deed, however, was not held by the court to relate to the date of his purchase at sheriff's sale, but to the date of the mortgage itself. "The deed took effect by

relation at the date of the mortgage and passed fixtures subsequently annexed by the mortgagor: Winslow v. Mer. Ins. Co., 4 Met. (Mass.) 313, 38 Am. Dec. 368. By their wrongful severance the fixtures became personal property, for the recovery of which the present action was properly brought," etc.

Under the doctrine of that case the plaintiffs here—the mortgagors—cannot maintain this action to recover the value of the fixtures removed intermediate the giving of the mortgage and the delivery of the sheriff's deed. The effect of the foreclosure resulting in the delivery of the deed was to vest the legal title to the entire mortgaged premises, including the fixtures, in the grantee of the sheriff.

2. There is nothing in the objection, made here apparently for the first time, that the notice of intention to move for a new trial and the statement in support of the motion came too late. It does not appear that any such objection was relied upon below by the respondent.

The statement was settled by stipulation of counsel and no objection of that character was observed (Quivey v. Gambert, 32 Cal. 304), nor, so far as appears, in any manner brought to the attention of the court below in proceeding to obtain a new trial of the action.

Judgment and order denying a new trial reversed and cause remanded,

We concur: Crockett, J.; Niles, J.

I dissent: Rhodes, J.

McKINSTRY, J.—I concur in the judgment. The mortgagee was the purchaser at the foreclosure sale, and, as between mortgagor and purchaser at such sale (and those claiming under them), the sheriff's deed took effect, by relation, as of the date of the mortgage. If this action had been brought against the mortgagee, he would have had a defense, as being then the owner of the property and entitled to its possession; his rights would have been the same as if the fixtures had remained annexed to the freehold. They were removed by the defendant with the consent of the mortgagee, and the former was authorized to defend under the latter's title.

T. G. MORROW, Respondent, v. JESSE KINGSBURY and JAMES WINKLER, Appellants.

No. 4504; October 7, 1875.

**Public Land—Sixteenth Section Granted to State.**—Unless affected by some valid pre-emption right, the title to land included within a sixteenth section vested in the state, upon approval of the survey of the township, under the act of Congress granting sixteenth and thirty-sixth sections.

APPEAL from Tenth Judicial District, Colusa County.

J. T. Harrington and W. C. Belcher for respondent; L. J. Ashford for appellants.

RHODES, J.—The title to the land in controversy (it being a portion of a sixteenth section) vested in the state upon the approval of the survey of the township, unless there existed a valid pre-emption right to the land acquired under the act of Congress of March 3, 1853, the act granting the sixteenth and thirty-sixth sections to the state: See Sherman v. Buick, 45 Cal. 665.

The settlement, as appears by the declaratory statement, was not made until the year 1870, which was not within the time mentioned in the act of March 3, 1853.

Judgment affirmed.

We concur: Crockett, J.; Niles, J.

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SAMUEL MERRITT, Respondent, v. P. S. WILCOX, Appellant.

No. 4691; October 7, 1875.

**Payment—Kind of Money.**—An Allegation in a Complaint for the payment of money that the understanding between the parties was that payment was to be made in a particular sort of money, presents an issuable and material fact which, if denied by the answer, must be proven.

**Trial.**—A General Verdict That the Plaintiff Recover a Certain Sum of money may be construed as a finding in favor of the plaintiff upon all the issuable facts stated in the complaint.

**Judgment—Amending to Make Payable in Gold.**—When an issuable fact, in an action for the payment of money, is the payment in gold coin, and, the jury having rendered a general verdict for the plaintiff for a certain sum, judgment is entered accordingly, the trial court may amend the judgment by making it payable in gold.

APPEAL from Third Judicial District, Alameda County.

Geo. A. Nourse and A. P. Hoge for respondent; McAllister & Bergin and J. E. Martin for appellant.

See Merritt v. Wilcox, 52 Cal. 238.

RHODES, J.—In an action on a contract for the payment of money the plaintiff may allege in the complaint that it was understood and agreed by and between the parties that payment should be made in a specified kind of money; and such allegation presents a material and issuable fact, and, if denied by the answer, must, like any other fact in issue, be proven. It in truth constitutes a material term of the contract. The rule is well recognized that a general verdict—that the plaintiff recover a certain sum of money—is construed as a finding in favor of the plaintiff upon all the issuable facts stated in the complaint. No sufficient reason was suggested at the argument why the issue in question should be withdrawn from the operation of the general rule, nor do we perceive anything in the nature of that term of the contract, or in the allegation of that fact, as a matter of pleading which requires a construction to be given to the verdict differing in any respect from that which would be applicable in respect to any other issuable fact averred in the complaint.

We are therefore of the opinion that the court, without regard to the affidavits filed by the respective parties, was fully justified in amending the judgment so as to make the money payable in gold coin.

Judgment and order affirmed.

We concur: Crockett, J.; Niles, J.

THOMAS SHARP, Respondent, v. MICHAEL GRIFFIN, Appellant.

No. 4248; October 18, 1875.

**Appeal—Conflicting Evidence.—Findings of the Trial Court from evidence substantially conflicting are not to be disturbed on appeal, even though having the appearance of not being justified by the evidence.**

APPEAL from Tenth Judicial District, Sierra County.

This was a suit to have declared a mortgage an instrument in form more a bill of sale, and for a foreclosure. On August 7, 1869, the defendant James Arnott was indebted to the plaintiff in the sum of seven hundred and ninety-two dollars and to the defendant Griffin in the sum of eleven hundred and sixty dollars. The three met on that day, and, since Arnott had declared he had no money to pay either creditor, it was agreed that he should execute some such instrument as the following. The particular form was the result of the writing being done by Sharpe, he using his own words, but, as he testified, not departing intentionally from the sense of what Arnott dictated to him. The instrument actually signed was this:

"Know all men by these presents that James Arnott, resident of Brandy City, Lincoln Township, County of Sierra, State of California, party of the first part to these presents, do hereby cede, sell and deliver, and by these presents do convey unto Michael Griffin, of Brandy City, township, county and state aforesaid, all my right, title and interest in and to a certain mining claim situate on Grizzly Hill, in the county and state before named; said right and title being one undivided one-fifth interest in the claims known and designated as A. Sharpe and Company's Claim, for the sum of $1,160 to me in hand paid, and for the further sum of $792, which my interest owes Thomas Sharpe, of said Co., which the party of the second part agrees to pay as fast as it comes out of the claim, after deducting three dollars a day for living for each day's work, together with one undivided one-fifth interest in all mining tools and appurtenances of whatever nature or kind. Witness my hand this seventh day of August, 1869."

The instrument was duly executed by Arnott and witnessed, and on the same day properly acknowledged, and was recorded July 15, 1873, shortly before the bringing of the action.

In their answers and by their testimony at the trial both defendants took the position that this was not intended to be a mortgage, and that the condition in it relating to the payments to Sharpe was understood by all three, at the time the paper was executed, to mean that Griffin should pay Sharpe only out of any excess there might be over three dollars a day coming to him, Griffin, individually in working the mine. As a fact there never happened to be this excess, although Griffin continued to work on the claim until June, 1873. Sharpe himself corroborated the defendants' testimony on that point.

P. Vanclief & D. H. Cowden for respondent; J. L. Lockwood for appellant.

By the COURT.—There is a substantial conflict in the evidence as to the fact whether the bill of sale was intended as a mortgage. The court below finds that it was so intended, and we cannot disturb the finding. Assuming it to have been a mortgage, the provision by which the defendant "agrees to pay as fast as it comes out of the claim, after deducting three dollars a day for living, for each day's work," is not to be construed as an agreement that the debt to the plaintiff shall be paid only out of the proceeds as they come out of the claim after deducting the three dollars per day. The defendant (Griffin) was not liable for the plaintiff's debt, and did not agree to pay it, except conditionally in the manner stated. He undertook, it is true, to apply the proceeds, after deducting the per diem to the plaintiff's debt; but the debt was due when the instrument was executed, and there was no stipulation to extend the credit. There is no error in the record.

Judgment affirmed.

JAMES S. CLARK, Appellant, v. MARK ANTHONY, Respondent.

No. 4506; October 25, 1875.

**Appeal—Conflict of Evidence.—On Appeal from an Order Denying a motion for a new trial, where the ground for the motion was that the evidence did not support the findings, the findings are not to be disturbed, if there was a substantial conflict of evidence.**

APPEAL from Twelfth Judicial District, San Mateo County.

E. J. Pringle for appellant; B. S. Brooks for respondent.

By the COURT.—The action is ejectment and was commenced November 10, 1869. One of the defenses set up in the answer is the statute of limitations, and the finding on this point is "that the entry of the defendant Anthony was made on the first day of October, 1863, and was not wrongful or unlawful, and has ever since been maintained adversely to plaintiff; . . . . that neither the plaintiff, his ancestors, predecessors, or grantors, or either or any of them, have been seised or possessed of said demanded premises within five years before the commencement of this action; but the defendant has been in the actual, adverse possession thereof under claim of title, exclusive of all other right, and expressly adverse to the claims of plaintiff."

The plaintiff assails this finding on the ground that, as he alleges, it appears from the evidence that the defendant's grantor, from whom he obtained the possession, entered in subordination to the plaintiff's title, and that the defendant is estopped to set up an adverse title until he surrenders the possession. He claims, moreover, that the evidence does not support the finding that the possession of the defendant was in fact adverse.

It is sufficient to say that there is a substantial conflict in the evidence on these points.

Judgment and order affirmed.

AUGUST FINGER, Respondent, v. VALENTINE DIEL, Appellant.

No. 4390; October 26, 1875.

**Damages—Verdict Calling for "Gold Coin."**—A verdict requiring the damages found to be paid in gold coin is bad if the action was not on a contract for money expressly so payable, or there was not an understanding between the parties that it was to be so payable, or the money was not received by the defendant in a fiduciary capacity.

**Judgment—Conformance to Verdict—Gold Coin.**—A money judgment on a verdict erroneous only in respect of its requiring payment to be made in gold coin cannot be modified on appeal. The judgment must conform to the verdict; hence the defendant is entitled to a new trial.

APPEAL from Second Judicial District, Santa Clara County.

Collins & Newman for respondent; Frederick Hall for appellant.

By the COURT.—The verdict of the jury was in favor of the plaintiff, and assessed the damages at the sum in the verdict mentioned "in United States gold coin." The action was not founded upon an obligation in writing for the payment of money in gold coin, nor did the plaintiff allege any agreement or understanding between the parties in respect to payment in gold coin, nor was the action brought against the defendant for the recovery of money received by the latter in a fiduciary capacity; in short, the case is not brought within any of the conditions prescribed in section 667 of the Code of Civil Procedure, authorizing a recovery in gold coin, or in money of a specified character. The verdict for gold coin was, therefore, unauthorized.

Nor can the error in this respect be corrected by modifying the judgment here. The judgment must conform to the verdict: Code Civ. Proc., sec. 664.

The verdict should, therefore, have been set aside.

In this view, and as the cause must be tried again, the disposal of the appeal taken from the judgment is of no con-

sequence to the parties. That appeal will, therefore, be dismissed without reference to the question of practice made by the respondent as to whether the appeal was well taken.

Appeal from judgment dismissed and order denying a new trial reversed and cause remanded for a new trial.

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JOSEPH PONCE, Appellant, v. CHARLES McELVY, Respondent.

No. 4841; November 2, 1875.

**Appeal—Contradictory Evidence in Record.**—The practice of the supreme court is to refrain from disturbing a finding of fact, made by the trial court and supported by evidence in the record, merely because the evidence on the point is contradicted by other evidence also appearing in the record.

**Evidence.—Questions as to the Mere Credibility of Opposing Witnesses** and as to the weight to be given this or that one of conflicting statements are for the trial court.

APPEAL from Fourteenth Judicial District, Nevada County.

G. N. Sweezy and Caldwell & Caldwell for appellant; Belcher & Belcher and Niles Searles for respondent.

See Ponce v. McElvy, 47 Cal. 154; 51 Cal. 222.

By the COURT.—One of the defenses relied upon is that the plaintiff sold and transferred the Le Coat note and mortgage mentioned in the complaint to Neville, and the court below found the fact to be that in the year 1865 "the plaintiff sold, assigned and transferred the note and mortgage described in the complaint to one R. Neville, who thereupon became and was the owner and holder thereof in his own right, and not as a pledge or trust." It was conceded by the counsel who represented the appellant at the argument that the judgment below must be affirmed if there is evidence in the record which supports this finding.

It is the settled practice of this court not to disturb a finding of fact, made by the trial court and supported by

evidence in the record, merely because the evidence upon the point is contradicted by other evidence also appearing in the record.

Questions concerning the mere credibility of opposing witnesses and the consequent weight to be attached to their respective statements, when fairly in conflict, are matters for the determination of the trial court, where, in the nature of things, the opportunities for a correct determination in that respect are superior to those afforded in an appellate court.

We think that the application of this rule must operate an affirmance of the judgment in this case. Without attempting a detailed review of the evidence given for the defendants, it is sufficient to say that Henry Powell distinctly testified at the trial that the plaintiff admitted to him that he had sold the Le Coat note and mortgage to Neville, and that Neville had cheated him in the transaction.

Now, the credibility of this evidence was sharply assailed at the argument in this court, as it doubtless was in the court below, and a variety of circumstances are referred to going to show that it is unworthy of belief. But if the court below, notwithstanding all this, believed Powell, we cannot, under the rule referred to, disturb its conclusion in that respect.

Judgment and order denying a new trial affirmed.

Mr. Justice Niles, being disqualified, did not sit in this cause.

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WM. C. SHELDON and CATHERINE SHELDON, Appellants, v. B. B. MURRAY, C. KIDDER, W. K. LINDSAY and H. TAYLOR, Respondents.

No. 4191; November 27, 1875.

**Ejectment—Right of Plaintiff to Possession.**—In ejectment the plaintiff, in order to recover, must show he was entitled to the possession at the time his action was brought.

**Executor—Effect of Confirmation or Patent of Land to.**—By a confirmation duly had or a patent duly issued to a person as executor or administrator, the legal title vests in him rather than in the equitable owners by reason of inheritance or devise from the decedent.

Armstrong & Hinkson for appellants; McKune & Welty and R. C. Clark for respondents.

By the COURT.—It is well settled that the issues joined in an action of ejectment relate to the commencement of the action, and that unless the plaintiff show that he was entitled to the possession at the time the action was brought, he cannot recover: Yount v. Howell, 14 Cal. 465; Owen v. Fowler, 24 Cal. 192; Hestres v. Brennan, 37 Cal. 385.

It is equally well settled that a confirmation had and patent issued (pursuant to the provisions of the act of Congress of March 3, 1851, to settle private land claims in the state of California) to a person as executor of another, or as administrator of his estate, vests the legal title in the confirmee and patentee, and not in other persons, even though such other persons be equitable owners of the premises described in the confirmation and patent, as being devisees, heirs, or the like: Hartley v. Brown, 46 Cal. 202, and cases there cited.

These actions were respectively commenced in January, 1872. At that time Catherine F. Sheldon and Gabriel W. Gunn held the legal title to the premises in controversy. It had vested in them on the first day of July, 1870—the day of which the patent bears date. It was not until February, 1872, that a decree was entered in the action brought by William C. Sheldon and Catherine Sheldon against the patentees directing the latter to convey to the plaintiffs the legal title, nor was the deed pursuant to that decree delivered until December, 1872.

It results that judgment in each of these cases was correctly rendered below for the defendants, and must be affirmed here.

So ordered.

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